

**Oregon Law Commission  
Report to the 2007 Legislative Assembly**

**REPORT ON GOVERNMENT ETHICS**

**SB 494, SB 495, SB 496, SB 497, SB 498,  
HB 2594, HB 2595, HB 2596, HB 2597, and HB 2598**

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## I. INTRODUCTION

The overarching principle of governmental ethics in a democratic society is the fiduciary concept of public service as a public trust.<sup>1</sup> Thomas Jefferson enunciated this basic principle by simply stating “[w]hen a man assumes a public trust, he should consider himself as public property.” Underlying the principle of public trust are two closely related concepts that may be regarded as its major corollaries: (a) public officials shall not use public office for private gain; and (b) public officials shall act impartially and not give preferential treatment to anyone.

While almost everyone will agree upon the importance of these principles, substantial controversy and some measure of disagreement exists on how best to achieve ethical conduct in government. Approaches to promoting ethical conduct can be arrayed along a continuum with education, training and gentle persuasion at one end, and specific rules with sanctions, including criminal penalties, at the other. The focus here is upon substantive and procedural rules, including sanctions for rule violations, expressed in Oregon’s government ethics laws.

There is widespread agreement that Oregon’s government ethics laws are in need of revision. Most of those ethics laws, including a “code of ethics” (ORS 244.040), are contained in ORS Chapter 244.<sup>2</sup> Additional relevant statutory provisions are found in ORS Chapter 171 (lobbying) and Chapter 260 (campaign finance).

Since the ethics code was first adopted in 1974, ORS Chapter 244 has been amended in each regular legislative session except those held in 1981 and 1985. The relevant provisions of Chapter 171 on lobbying and Chapter 260 on campaign finance have also been amended from time to time. The Oregon Law Commission’s Government Ethics Project is a direct result of the continuing controversy surrounding government ethics law.

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<sup>1</sup> In Oregon, the principle is specifically set forth in the very first sentence of ORS Chapter 244 as follows: “The Legislative Assembly hereby declares that a public office is a public trust, and that as one safeguard for that trust, the people require all public officials to adhere to the code of ethics set forth in ORS 244.040.” ORS 244.010(1). Why a code of ethics? James Madison put it this way: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.” James Madison, *Federalist #51*. As Oregon law recognizes, a code of ethics is a useful safeguard in establishing and maintaining that control.

<sup>2</sup> Although ORS 244.040 is specifically labeled a “code of ethics,” and contains many of the substantive prohibitions in current ethics law, other substantive provisions are found elsewhere in Chapter 244. Most of the remainder of this chapter is devoted to procedural matters, the organizational structure of the Government Standards and Practices Commission, and a delineation of sanctions for violations of ethics laws.

## II. HISTORY OF PROJECT

The most comprehensive ethics bill to come before the Legislative Assembly in recent years was House Bill 3328, introduced in 2003. The Legislative Assembly approved the bill, but Governor Kulongoski vetoed it on September 25, 2003. In November, 2003, Governor Kulongoski requested that the Oregon Law Commission review Oregon's government ethics laws and prepare a comprehensive revision for recommendation to the next regular legislative session. The Oregon Law Commission agreed, subject to funding, to prepare a comprehensive revision of Oregon's government ethics law for the 2007 legislative session, concluding that the necessary work could not be accomplished in time for the 2005 session. The Commission subsequently directed staff to prepare a preliminary report analyzing Oregon's ethics laws as an initial step toward revision. That preliminary report was presented to the 2005 Legislative Assembly. At the close of the 2005 legislative session, the Assembly provided funding and directed the Oregon Law Commission to prepare a further report and draft legislation on government ethics laws, campaign finance and lobbying for its consideration during the 2007 session.<sup>3</sup>

In response to this charge, the Oregon Law Commission established the Government Ethics Work Group in the fall of 2005. Oregon Law Commissioner, Attorney General Hardy Myers, was selected to serve as Chair. The following individuals were invited and agreed to serve as members of the Work Group:

Justice Hans Linde - Retired Oregon Supreme Court Justice; Currently Distinguished Scholar in Residence, Willamette University College of Law; Member of the Oregon Law Commission

Greg Mowe - Attorney, Stoel Rives LLP; Member of the Oregon Law Commission

Deputy Chief Debbie Baker - Salem Police Department

Chuck Bennett – Lobbyist for Council of School Administrators

Rep. Vicki Berger - State Representative, District 20

Steve Bryant – Former City Administrator, City of Albany

Keith Garza – Former Staff Attorney for the Oregon Supreme Court; Attorney for Tri-Met

Sen. Betsy Johnson - State Senator, District 16

John Junkin – Attorney, Bullivant Houser Bailey P.C.

Carla Kelley - Attorney, Port of Portland

Margaret Olney – Attorney, Smith Diamond & Olney

Larry Rew – Attorney, Private Practice in Pendleton; Former Oregon State Bar President

Mardilyn Saathoff - Attorney, Tektronix Inc.; Former Legal Counsel to Governor Kulongoski

John Schoon - Former State Legislator and Former Member of the Oregon Government Standards and Practices Commission

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<sup>3</sup>See SB 420 (2005) (not adopted) and HB 5023-A appropriating general funds to Emergency Board (DAS budget note at page 13).

Additionally, a number of interested persons were invited to participate in the Work Group as advisors.

Bruce Bishop - Attorney and Lobbyist, Harrang Long Gary Rudnick P.C.  
John DiLorenzo - Attorney and Lobbyist, David Wright Tremaine LLP  
Susan Grabe – Attorney and Public Affairs Director, Oregon State Bar  
Jim Green – Attorney, Oregon School Boards Association  
Pat Hearn - Former Executive Director of the Government Standards and Practices Commission (Replaced by Don Crabtree who was Acting Executive Director of the GSPC after Pat Hearn resigned)  
Genoa Ingram - Executive Director, Oregon Fire District Directors Association  
John Lindback – Administrator of the Election Division, Secretary of State Office  
Jim Markee - Lobbyist, Markee & Associates  
Harvey Mathews – Lobbyist, Associated Oregon Industries  
Andi Miller - Executive Director, Common Cause  
Christy Monson – Legislative Director, League of Oregon Cities (Replaced by Mike McCauley, Executive Director, League of Oregon Cities)  
Janice Thompson - Executive Director, Money in Politics Research Action Project

Advisors participated actively in all meetings.

The Work Group and Oregon Law Commission also benefited from the active involvement of Senior Deputy Legislative Counsel, Ted Reutlinger, throughout the work group process. The Oregon Law Commission commends Senior Deputy Legislative Counsel Reutlinger for his excellent work. His crucial and time-consuming work in preparing carefully crafted draft legislation for review by the Work Group, the Oregon Law Commission and the Legislative Assembly, made this large project possible. The Commission also extends its thanks to Legislative Counsel, Ann Boss, and the entire staff of LC drafters and publication services personnel in the Office of the Legislative Counsel.

The Government Ethics Work Group held its first meeting in November 2005 and followed that session with a second meeting in December. At the December 2005 meeting the Work Group organized into two sub-work groups. Sub-Work Group #1, chaired by Attorney General Hardy Myers, was assigned responsibility to study and prepare recommendations on 6 topics involving government ethics standards.<sup>4</sup> Sub-Work Group #2, chaired by Oregon Law Commissioner Greg Mowe, was assigned responsibility to study and prepare recommendations on 8 additional topics generally involving administrative aspects of government ethics.<sup>5</sup>

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<sup>4</sup> Assigned topics: (1) Campaign Finance, (2) Gifts, Honoraria and Financial Gain, (3) Conflicts of Interest, (4) Subsequent Employment and Nepotism, (5) Substantive Reporting Requirements, and (6) Lobbying.

<sup>5</sup> Assigned Topics: (1) Organizational Structure, (2) Rule Making and Advisory Opinions, (3) Adjudication Procedures, (4) Education and Training, (5) Procedural Reporting Requirements, (6) Sanctions and Remedies, (7) Monitoring and Evaluation, and (8) Funding.

Each sub-work group met 11 times during 2006, usually once or twice a month, for a total of some twenty-two meetings. Those meetings were followed by two public hearings held in early October 2006 (one in Portland, the other in Salem). Three additional meetings of the full Government Ethics Work Group were held in late October and early November 2006 to review and finalize recommendations.<sup>6</sup>

The Commission's work and the collective wisdom of the Government Ethics Work Group and its sub-work groups is distilled in the legislative proposals accompanying this report<sup>7</sup> and additional non-statutory recommendations presented to the Legislative Assembly. Members of the Oregon Law Commission were apprised of the Work Group's activities throughout the work group process. Commissioners regularly received summary meeting reports (SMR's) of Work Group and Sub-Work Group actions and thus were well aware of the issues, concerns and recommendations coming from the Work Group. In addition, Commissioners were provided with detailed staff summaries of the final Work Group recommendations and drafts of proposed legislation reflecting those recommendations prior to the Commission's meetings on November 15, 2006, and December 20, 2006. The recommendations and the legislative proposals embodying the recommendations were discussed and debated by the Law Commission. The Oregon Law Commission reviewed and discussed the Work Group's recommended legislative and non-legislative proposals on November 15, 2006. Those proposals, as amended by the Commission based upon its further discussion and debate, were approved at the December 20, 2006 meeting of the Oregon Law Commission with direction that they be provided to the Legislative Assembly along with this report.

### **III. THE PROBLEMS THAT THESE PROPOSALS ADDRESS**

#### **Overview**

The Government Ethics Work Group identified several broad areas of concern to address.

- Campaign finance
- Receipt of gain
- Disclosure of gain and conflicts of interest
- Employment-related conflicts
- Lobbying
- Organizational structure, duties, and powers of a government ethics entity
- Funding for the administration of government ethics

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<sup>6</sup> Considering that most of these meetings lasted about 3 hours (not including preparation time), and that each of the 15 Work Group member served on one of the sub-work groups, that represents more than 500 hours of time volunteered to law improvement in Oregon—an impressive number. That figure doesn't begin to take into consideration the amount of time invested by advisors, interested persons, and Oregon Law Commission staff not only in attending the meetings, but in preparing for those meetings, conducting research and responding to questions and requests for information. All in all, the state of Oregon has been the beneficiary of several thousands of hours of time by persons who are knowledgeable about the issues and concerned about good public policy.

<sup>7</sup> See HB 2597, HB 2598, SB 494, SB 498, SB 497, SB 495, HB 2594, SB 496, HB 2595 and HB 2596.

The Work Group also considered a number of more specific issues under each of those general topics. Those specific issues were drawn from information provided to the Work Group by Oregon Law Commission staff, oral and written testimony provided at various work sessions and public hearings, as well as the personal and professional experiences and expertise of Work Group members and advisors.<sup>8</sup> As the project progressed, the Work Group gave additional consideration to current ethics complaints and news coverage on ethics issues of local and statewide concern.<sup>9</sup>

Among the more specific issues addressed by the Work Group were: (1) what should be permissible use(s) of campaign contributions; (2) whether public officials, their spouses, relatives and household members should be allowed to receive any gifts or other things of value, such as food, lodging, travel or entertainment from persons with a legislative or administrative interest; (3) whether there should be *de minimis* exceptions to rules on the receipt of gifts and other things of value, or on the use of public equipment; (4) how to clarify ambiguous and conflicting rules, including rules on the definition and treatment of gifts, conflicts of interest, and reporting requirements; (5) whether any official should be able to make a decision or take any action when faced with an actual conflicts of interest; (6) whether civil penalties were appropriate for “inadvertent” or technical errors by public officials, in light of the potential “chilling” effects on public service of strict liability for even unknown, unintentional-but reasonable-errors; and (7) how to establish and maintain an adequate budget for the administration of ethics laws that is insulated from undue political pressure.

### **Predicate Decisions: The Road Not Taken**

“Two roads diverged in a wood, and I –  
I took the one less traveled by,  
And that has made all the difference.

Robert Frost, *The Road Not Taken*<sup>10</sup>

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<sup>8</sup> Staff provided information analyzing prior legislative proposals and the history of ethics reform in Oregon, summarizing ethics opinions and case histories of matters before the Government Standards and Practices Commission and Oregon courts, identifying specific ethical issues raised in Oregon and elsewhere by media and interested persons, and summarizing oral and written testimony before the Work Group and its sub-work groups.

<sup>9</sup> The Work Group was certainly aware of specific recent public controversies involving such varied matters as trips to Hawaii and Israel provided by lobbyists to legislators, free meals and entertainment provided to public officials, the alleged misuse of cell phones and frequent flyer miles by public officials, and employment of relatives by legislators. Various members of the Work Group also attended one or more meetings of the Government Standards and Practices Commission to observe how actual controversies were handled by that body.

<sup>10</sup> From *The Poetry of Robert Frost* by Robert Frost, edited by Edward Connery Lathem. Copyright 1916, 1923, 1928, 1930, 1934, 1939, 1947, 1949, © 1969 by Holt Rinehart and Winston, Inc. Copyright 1936, 1942, 1944, 1945, 1947, 1948, 1951, 1953, 1954, © 1956, 1958, 1959, 1961, 1962 by Robert Frost. Copyright © 1962, 1967, 1970 by Leslie Frost Ballantine.

As Robert Frost observed in *The Road Not Taken*, any decision, whether explicit or implicit, has consequences for future choices. Before turning to the specific legislative drafts, it is worthwhile to briefly note several decisions, conclusions or assumptions (collectively referred to as “predicate decisions”) that framed the work group’s consideration of government ethics reform. Those decisions fundamentally shaped the direction of these proposals—and that, in the words of the poet, “has made all the difference.” The five most important of those predicate decisions are:

- *Unity*. Maintain a *unitary* structure of ethics governance

The statutory proposals assume and build upon a single, comprehensive ethics governing entity that applies to all public officials. The Work Group considered and rejected approaches to ethics governance that would create multiple ethics governing entities. The broad coverage of all elected and appointed public officials, including employees and volunteers, at all levels of government (state, local, special district or other type of entity) is maintained by these statutory proposals.

- *Uniformity*. Enhance the *uniformity* of rules and rule application to all public officials

The Work Group consciously determined that ethics rules should apply equally to all public officials, unless there was a compelling reason to treat some officeholders differently than others.

- *Transparency*. Enhance the *transparency* of ethics laws and governance by emphasizing uniformity, clarity and consistency of rules and by minimizing exceptions and exclusions

The Work Group operated from the assumption, sometimes expressed only implicitly, that ethics laws and the ethics governing structure should be as transparent and as understandable as possible. As a practical matter, promoting transparency meant trying to simplify rules where possible, eliminate perceived inconsistencies and minimize exceptions or exclusions from coverage of particular rules.

- *Continuity*. Maintain *continuity* of the basic statutory framework

The Oregon Law Commission was charged to conduct a comprehensive review and evaluation of Oregon government ethics laws. Importantly, the Work Group implicitly accepted the basic statutory framework of Chapter 244, making its decisions and recommendations by adding to, subtracting from, and modifying (amending) existing provisions of the Oregon Revised Statutes. This decision is not inconsistent with comprehensive review, but it does mean that one is not beginning with a clean slate. The recommended end product bears significant similarity to existing law, particularly in the basic organization and structure of the ORS Chapter 244 provisions.

- *Consistency.* Enhance *consistency* with fundamental ethical principles.

Consistency with fundamental ethical principles is generally enhanced when rules are simple and apply universally without exceptions. Exclusions and exceptions, particularly exclusions from and exceptions to key statutory definitions, can significantly erode the actual consistency of the statute with the underlying principle(s) upon which it is based.<sup>11</sup> The Work Group clearly did not attempt to eliminate every exception to or exclusion from general ethical rules. On the other hand, for the most part, the group did carefully consider whether those exceptions or exclusions were justified and consistent with the underlying principles. By considering its decisions within a framework of fundamental ethical principles, the Work Group sought to balance considerations providing support for exceptions and exclusions with the broad goal of developing law that consistently applied those fundamental ethical principles.

## **The Legislative Proposals**

### **A. Campaign Finance (Use of Campaign Contributions) (HB 2597)**

#### **1. Issues identified from Existing Law.**

The growing cost of political campaigns, the unequal access to political decision-makers that large campaign contributions may provide, and the potential to divert those contributions to personal or other inappropriate use makes campaign finance a perennially “hot” topic.<sup>12</sup> The Oregon Law Commission deliberately limited its consideration of campaign finance law to the two matters that are most directly related to ethical concerns about the conduct of public officials: (a) the disclosure of campaign contributions, and (b) limits on the use of contributions.<sup>13</sup> Upon further review, the Government Ethics Work Group decided that the Elections Division of the Secretary of State was for the most part adequately addressing disclosure through the development of an on-line “real time” system of reporting all campaign contributions and expenditures. Development of that system was previously mandated by the Legislative Assembly and is to be implemented by January 1, 2007. For this reason, the Work Group took no further action on that matter, instead devoting its full attention to one basic issue: the appropriate

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<sup>11</sup> Exceptions and exclusions also make it more difficult to understand the law, and introduce a lack of uniformity in treatment, creating tension with the predicate decisions of uniformity and transparency.

<sup>12</sup> Significant issues of public policy involving campaign finance include: (1) whether campaigns should be publicly or privately funded; (2) whether steps should be taken to limit the overall cost of political campaigns; (3) the limits, if any, which should be placed on campaign contributions by individuals, corporations, unions or a variety of political action groups; (4) the extent, if any, to which campaign contributions and expenditures should be disclosed; and (5) the limits, if any, which should be placed on the use of campaign contributions.

<sup>13</sup> The Government Ethics Work Group did not consider, and the Commission takes no position on questions such as public funding, the cost of political campaigns or limits on making campaign contributions. The Commission acknowledges that any efforts to place limits on campaign contributions would likely require an amendment to the Oregon Constitution and that two ballot measures on the 2006 General Election Ballot attempted, unsuccessfully, to deal with this important topic.

uses of campaign contributions and the closely related question of who controls the expenditure of those funds.

2. Issues Addressed.

Particular concerns were expressed about three practices involving the use of campaign funds:

- Using campaign contributions to defray expenses incurred in fulfilling the responsibilities of public office once in office.
- Using campaign contributions to pay expenses also covered by legislative per diem payments (so-called “double-dipping”).
- Transferring campaign contributions to other persons or entities (sometimes called a “pass-through”).

The statutory recommendations address each of these specific issues.<sup>14</sup>

3. Alternative Approaches Considered.

States have adopted a variety of approaches to deal with the regulation of campaign contributions and expenditures. In some states, there are significant restrictions on political contributions and expenditures, while others, such as Oregon, rely heavily on disclosure. The Government Ethics Work Group began with the premise that campaign contributions were not the property of the candidate, but rather held by the candidate or campaign committee in a “trust” relationship with fiduciary obligations. The group concluded that disclosure, while helpful, was not sufficient to maintain this trust and carry out this policy. Indeed, some provisions of current law made campaign contributions seem like property of the candidate. The Work Group determined that greater clarity and more restrictions were needed in the law regarding permitted and prohibited uses in order to provide guidance to candidates and campaign committees concerning their fiduciary obligations.

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on campaign finance:

- a. Candidates and principal campaign committees of candidates may use campaign contributions only for campaign purposes, with certain very limited exceptions.

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<sup>14</sup> Some concern was also expressed about personal use of campaign contributions. Existing law already prohibits personal use, but does so with significant exceptions and some additional ambiguity caused by authorizing campaign contributions to “be used for any other lawful purpose.” See ORS 260.407(1)(d) and (2). The recommended statutory draft states the prohibition on personal use more succinctly and with only one exception: transfer to the principal campaign committee of the same candidate for nomination or election to a different public office.

- b. Candidates and principal campaign committees of candidates are specifically prohibited from:
- converting contributions to personal use by anyone;
  - making contributions to any other candidate or political committee (“pass-through”);
  - using contributions to defray expenses incurred in connection with duties of public office;
  - using contributions to pay civil or criminal penalties unless the conduct that gave rise to the fines was non-criminal; or
  - using contributions to pay certain kinds of membership dues.
- c. Candidates and principal campaign committees of candidates are specifically allowed to distribute campaign contributions to:
- the principal campaign committee of the same candidate for a different office; or
  - upon discontinuing their principal campaign committee to distribute excess contributions to certain charitable organizations,<sup>15</sup> a political committee of any political party, a legislative caucus political committee or (for legislative candidates) the Property and Supplies Stores account established by the Legislative Assembly.

Additional Recommendations. The Oregon Law Commission made additional recommendations that impact the transparency of disclosures and help ensure that those who are interested in whether campaign funds are being properly expended can adequately track expenditures. These recommendations: (1) provide that a candidate can designate only one political committee as the candidate’s principal committee; (2) prohibit a candidate from serving as his or her own treasurer except in very limited circumstances involving small, self-funded campaigns; and (3) allow campaign funds to be used to purchase liability insurance coverage for a person who serves as campaign treasurer.

Collectively the campaign finance recommendations constitute a significant change from existing law.<sup>16</sup> These recommendations clarify that campaign contributions can generally only be used for campaign purposes, substantially limit transfers to other entities, and prohibit their use to pay office expenses, civil penalties, and most membership dues.

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<sup>15</sup> The Oregon Law Commission amended the initial recommendation on charitable contributions from the Work Group by prohibiting contributions to charitable organizations whose charitable purpose is for the benefit of religion.

<sup>16</sup> Existing law prohibits only the personal use of campaign funds. Under current law campaign funds can be freely transferred to other candidates and campaigns. In addition, payment of office expenses, membership dues, and certain penalties are allowed.

## Continuing Controversies.

Although substantial consensus was reached on most of these recommendations, objections were raised and noted to significant new restrictions on the use of campaign contributions made to principal campaign and candidate committees. The most controversial of the proposed restrictions (a) prohibit use of campaign funds for payment of expenses incurred in connection with duties of public office and (b) transfers to other candidates or political campaigns. Some persons would continue to allow use of campaign contributions for some or all of these items. However, the Law Commission has chosen to address reasonable concerns about restrictions on the use of campaign funds through other recommendations. For example, the Law Commission has taken a strong position that reasonable expenses of holding public office should be paid with public money. A non-statutory recommendation to increase the Legislative Assembly's own budget to adequately pay for reasonable expenses (staff, computers, paper, travel, mailing, copying, etc.) once in office is tied to this recommendation.

A second area that may remain controversial is recommendation of a limited ban on the use of campaign funds to pay for fines or other penalties imposed on a candidate or principal campaign committee. Under existing law, campaign funds can be used for this purpose. The Work Group recommended a full ban on this practice. However, the Commission, by split vote, amended its recommendation to allow use of campaign funds for this purpose if the conduct that gave rise to the fines was non-criminal. The partial ban may not satisfy critics who oppose the use of campaign funds to pay any kind of fine or penalty. On the other hand, eliminating the use of funds for this purpose has been opposed by those who object to the impact of expanded personal financial liability on the willingness of people to participate in the political process.<sup>17</sup>

Legislative Counsel expressed concern that the recommended prohibition on transfers to other candidates or political committees may violate the very broad right to freedom of expression guaranteed by Article 1, Section 8 of the Oregon Constitution. See *VanNatta v. Keisling*, 324 Or 514 (1997). The Work Group and the Oregon Law Commission was aware of these constitutional concerns, but proceeded on the basis that the recommended statutory restriction was both important and likely constitutional because it was narrowly tailored to address a significant harm to the public. By doing so, the Oregon Law Commission at least impliedly concurred in the view that the proposed restrictions could be distinguished from the holding in *VanNatta* on several grounds, including the fiduciary concept that contributions made to a specific campaign committee are held in trust for that campaign and do not belong to the candidate.

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<sup>17</sup> In this regard, it is important to note that a separate legislative proposal advanced by the Oregon Law Commission proposes to allow creation of legal expense trust funds to which contributions may be made for this purpose. That proposal is discussed elsewhere in this report (See HB 2596).

## **B. Receipt of Gain (Gifts, Honoraria, Financial Gain) (HB 2598)**

### **1. Issues Identified from Existing Law.**

One of the most basic principles of governmental ethics is that government employees and public officials shall not use public office for private gain. Oregon law prohibits all public officials from using their official position or office to obtain financial gain or avoidance of a financial detriment, with certain specific exceptions, most notably, official salary and reimbursement of expenses. Despite this general principle that seems clearly embedded in existing law, Oregon's statutory framework for dealing with financial gain is confusing and riddled with exceptions.

This section focuses on three areas within the financial gain framework that have raised significant concerns: financial gain generally, gifts, and honoraria.<sup>18</sup> Among the specific issues that have been identified are:

- Whether and under what circumstances the personal use by public officials of public equipment and resources, such as cell phones, the internet and frequent flier miles is appropriate.
- The need to clarify the definition of a "gift" and the circumstances under which public officials are either allowed to or prohibited from receiving gifts.
- A perceived existing definitional inconsistency that arguably prohibits public officials from receiving any gifts from persons without a "legislative or administrative interest," while allowing gifts (within limits) from persons with a "legislative or administrative interest."
- How gift limits should be applied when gifts are provided by multiple sources.
- Whether public officials should be allowed to receive entertainment, food, lodging and travel, and, if allowed, the restrictions, if any, that should be placed on receipt of those items.
- Whether spouses and relatives of public officials should be able to accept entertainment, food, travel and lodging in connection with a public official's position.
- Whether any or all public officials should be allowed to accept honoraria in connection with their public office.

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<sup>18</sup>Other matters, such as nepotism and subsequent employment, may also be regarded as forms of financial gain. Those issues are treated separately elsewhere in this report and the accompanying draft legislation.

- Whether there should be *de minimus* exceptions to restrictions or prohibitions on the personal use of public equipment and resources, and the receipt of gifts or honoraria.

2. Issues Addressed.

The statutory recommendations in HB 2598 address each of the issues identified above.

3. Alternative Approaches Considered.

States have adopted a variety of approaches to deal with financial gain. They have generally done so by requiring disclosure of certain kinds of allowed financial gain and/or by prohibiting or setting limits on the receipt or solicitation of some types of gain, commonly including gifts, honoraria, food, lodging, travel and entertainment.<sup>19</sup>

The Government Ethics Work Group considered these various approaches to dealing with financial gain. Although there is an appropriate role for disclosure through reporting requirements, that approach alone was deemed inadequate to implement the basic ethical principle that public office should not be used for private gain. On the other hand, so-called “zero-tolerance” laws or total prohibitions on private gain were deemed unattainable, impractical and possibly contrary to the public interest by making public service unnecessarily unattractive. Instead, the approach adopted by the Work Group focuses on a combination of selective prohibitions and significant limitations on gain,<sup>20</sup> coupled with establishing threshold requirements for disclosing allowed gifts, food, beverage, lodging, travel and honoraria.<sup>21</sup>

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission advanced the following key recommendations on financial gain:

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<sup>19</sup> The treatment of gifts is a good example of the different ways in which states have chosen to deal with financial gain. Although every state prohibits giving or receiving gifts with the intention of influencing official action, states adopt different approaches to regulate the giving and accepting of gifts generally. A study by The National Conference of State Legislatures divides gift restriction statutes into three broad categories: “zero-tolerance,” “bright-line,” and pure “disclosure” laws. Almost half of U.S. states employ some form of a bright-line test, normally specifying a monetary threshold on gift limits. Oregon is one of those states. Unfortunately, the line has proved not to be as bright in Oregon as it could be. Additionally, Oregon, along with other states, exempts certain food, lodging, travel and entertainment from this bright line limit. Those exceptions have proven to be controversial.

<sup>20</sup> Limitations on out-of-state travel and a restriction on food and beverage to those items provided at an organized event were among other specific alternatives considered, but rejected by the Work Group and the Oregon Law Commission.

<sup>21</sup> The form of disclosures and processes involving disclosures are separately addressed elsewhere in this report and in the accompanying draft legislation.

- a. The current exception to the general prohibition on private financial gain for “salary” is expanded to clearly include fringe benefits and other items included in an official compensation package, approved by the employer.<sup>22</sup>
- b. Public officials may receive gifts without limit from persons without a “legislative or administrative interest.”
- c. Public officials may receive gifts from persons with a “legislative or administrative interest” up to a maximum value of \$100 for a single gift (regardless of how many persons provide or contribute to that gift) and an aggregate limit of \$250 per year on all gifts from any “single source.”
- d. The gift exception for “entertainment” is eliminated. Entertainment is treated as a gift for all purposes, including the limits above.
- e. Public officials may accept food, lodging, travel and the cost of registration in connection with an event where the official “participates in an official capacity.” The definition of “participates in an official capacity” is clarified and cost of registration is added.
- f. Public officials are not allowed to receive honoraria in connection with their public position except for *de minimus* honoraria having a value of \$50 or less, or as may be allowed for public officials in higher education under other statutory provisions.<sup>23</sup>
- g. Gifts and Honoraria over \$15 must be reported by mandatory SEI (Statement of Economic Interests) filers. Food, lodging, travel, registration fees and professional achievement awards over \$75 must also be reported.

Additional Recommendations. Several additional recommendations are also advanced in HB 2598, including recommendations to (a) require reporting of an unsolicited award for professional achievement valued at more than \$75, (b) allow public officials to receive professional publications and free or discounted professional education programs, (c) clarify that gifts to family and household members count against gift limits to public officials, (d) amend the definition of “public official” in ORS 244.020 for greater clarity.

#### Continuing Controversies.

Although the Oregon Law Commission eventually reached substantial consensus on these recommendations, objections were raised and noted to a number of issues involving

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<sup>22</sup> Cell phone usage and frequent flyer miles would be allowed if approved by the employer as part of a compensation package.

<sup>23</sup> Existing law allows most public officials to accept honoraria without limitation, but imposes somewhat complex and confusing restrictions on statewide elected officials and legislative officials. Legislative officials, for example, are allowed to accept honoraria in “relation to” their “private profession or occupation,” but those terms of limitation are not defined.

financial gain before both the Work Group and the Oregon Law Commission. One fundamental objection concerns whether there should be an outright ban or, at a minimum, significantly more severe limits, on all or almost all kinds of financial gain received by public officials from persons with a legislative or administrative interest, including gifts, food, lodging, travel, entertainment and honoraria.<sup>24</sup> The opposite concern has also been expressed, that is, that restrictions or prohibitions are generally inappropriate. A movement toward outright prohibition or more severe restrictions on gain is clearly consistent with the underlying ethical principles discussed previously, but is also subject to criticisms ranging from impracticality to unconstitutionality.<sup>25</sup>

Limitations on gifts and honoraria raise state constitutional issues about protected forms of expression. Legislative Counsel expressed concern that “gift limits raise constitutional issues under section 8, Article 1 of the Oregon Constitution.”<sup>26</sup> Oregon courts have not spoken directly on this issue. The concern is largely based upon Oregon Supreme Court holdings in two leading free expression cases interpreting the Oregon Constitution, *State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982) and *VanNatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997). The Work Group was aware of these constitutional concerns, but proceeded on the basis that the recommended statutory restrictions were both important and likely constitutional. The proposed restrictions can be distinguished from the holding in *VanNatta* under a *Robertson* analysis on the basis that gifts are not “political expression” in the way that campaign contributions are regarded by the courts, and that either a “historical exception” or an “incompatibility exception” is available under a *Robertson* analysis.

Limitations on honoraria may also raise federal constitutional issues.<sup>27</sup> Although the leading case does not apply directly to state ethics laws, at a minimum, it suggests that

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<sup>24</sup> A closely related concern is whether the proposed recommendations continue to rely too heavily on reporting of gain, rather than prohibiting such gain.

<sup>25</sup> Additional criticism of more severe restrictions focus on interference with common social courtesies, such as gift-giving and the availability of food and beverages at meetings, restricting access to public officials, and limiting a public official’s educational opportunities from attending sponsored events.

<sup>26</sup> See Memorandum from Ted W. Reutlinger, Senior Deputy Legislative Counsel, to Wendy Johnson, Deputy Director, Oregon Law Commission, dated November 14, 2006. In 2000, Legislative Counsel provided State Representative Max Williams with a detailed analysis of the constitutionality of restrictions on gifts to public officials, concluding that “gifts addressed by ORS 244.040 are expression protected by Article 1, Section 8, that the gift limits are focused on the content of speech per se and not on some forbidden effect that may be regulated, and that the resulting restriction of expression is not saved by any historical exception or incompatibility exception.” Legislative Counsel based its analysis upon the Oregon Supreme Court’s decision in the leading case on freedom of expression, *State v. Robertson*, 293 Or.402, 649 P.2d 569 (1982). The *Robertson* case established a framework that separates laws that effect speech into three categories, applying a different legal standard to each category. Legislative Counsel also gave considerable weight in its analysis to the decision in *VanNatta v. Keisling*, 324 Or. 514, 931 P.2d 770 (1997) that invalidated certain campaign contribution limits, expressing the view that the court’s reasoning in *VanNatta* regarding campaign contributions would also apply to gifts.

<sup>27</sup> In 1995, the U.S. Supreme Court struck down a provision of the federal Ethics in Government Act that prohibited receipt of honoraria by government employees. *U.S. v. National Treasury Employees Union*, 513 U.S. 454, 115 S. Ct. 1003, 130 L.Ed.2d. 964. It did so largely on free speech grounds, finding that

any restrictions on honoraria should be limited to those situations with some nexus to government employment.<sup>28</sup> The statutory recommendations limiting honoraria in HB 2598 take this concern into account: the restrictions apply only to honoraria “solicited or received in connection with the official duties of the public official.”

**C. Conflicts of Interest (SB 494)**

1. Issues Identified from Existing Law.

One of the basic postulates of ethical conduct in the public arena is that government employees and other public officials shall not hold financial interests that conflict with the conscientious performance of duty. Such interests could lead a public official to promote personal benefit over the public welfare or fail to treat the general public equally.

SB 494 makes changes to conflicts of interest law applicable to public officials in Oregon. Those changes primarily concern what public officials must do and not do when the official has either an actual or potential conflict of interest.

Significant issues of public policy involving conflicts of interest include:

- Whether there should be any exceptions to a general rule that public officials should not take an action or participate in a decision where the official has an “actual” conflict of interest.
- Whether the scope of “interests” covered under the conflicts prohibition should be expanded to include the interests of additional members of the household and relatives of a public official.
- Whether certain kinds of involvement by a public official with a non-profit organization should be treated as actual or potential conflicts of interest.

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Section 501(b) of the Ethics in Government Act of 1978, as amended by The Ethics Reform Act of 1989, created an overly broad restriction on expression, which did not pass the “balancing test” of the prior *Pickering* decision. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). At issue was the very broad language of Section 501(b) which said that “[a]n individual may not receive any honorarium while that individual is a Member, officer or employee.” Although the holding was limited to parties before the Court, the Office of Legal Counsel within the Department of Justice subsequently concluded that the prohibition on honoraria could not be enforced against any federal government employee.

<sup>28</sup>Honoraria received in connection with the duties or office of a public official are clearly a legitimate ethical concern because they could be used to get around gift restrictions intended to prevent favoritism and self-serving conduct.

2. Issues Addressed.

The statutory recommendations in SB 494 address each of the issues identified above. Particular attention is devoted to addressing conflicts involving members of the Legislative Assembly based upon state constitutional concerns.

3. Alternative Approaches Considered.

Conflicts of interest are ubiquitous in the public sector. Most if not all aspects of government ethics law deal in some manner with actual or potential “conflicts” between individual public officials and the broader public interest.<sup>29</sup> Such conflicts cannot be avoided, without depriving government of the knowledge and abilities of too many of its citizens. On the other hand, they cannot be tolerated if they lead to self-interested conduct. According to the ABA Committee on Government Standards, “the prohibition against exercising official power in order to further one’s own interest (or the interest of one’s family or friends) follows immediately and ineluctably from understanding public service as a public trust.”<sup>30</sup>

The issue raised here is a fairly narrow, but important one: How should public officials handle immediate conflicts of interest?<sup>31</sup> The two basic approaches to dealing with conflicts of interest are to require disclosure of those conflicts or to restrict or prohibit a public official from taking action or making decisions in situations involving conflicts.<sup>32</sup> In this regard, the options for dealing with conflicts are similar to the options available for handling issues of financial gain.

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<sup>29</sup> According to a study by the National Conference of State Legislatures, “ethics commissions and committees have reported that the largest number of requests for advice and counseling revolve around conflict of interest issues.” NAT’L CONFERENCE OF STATE LEGISLATURES, STATE OF STATE LEGISLATIVE ETHICS (2002) at 63. The same situation prevails in Oregon. Concerns about conflict of interest have led to numerous staff and advisory opinions by the Government Standards and Practices Commission. A review of opinions issued by the Government Standards and Practices Commission since 1997 shows that the GSPC issued over 100 staff opinions on conflicts of interest, more than any other category of opinions.

<sup>30</sup> ABA Committee on Government Standards (Cynthia Farina, Reporter), *Keeping Faith: Government Ethics & Government Ethics Regulation*, 45 ADMIN. L. REV. 287, 301 (1993).

<sup>31</sup> Certain aspects of conflict of interest, such as the receipt of gifts and things of value, honoraria, and the requirement to make periodic personal financial disclosures are dealt with elsewhere in this Report and are not discussed at this point.

<sup>32</sup> A review of state conflict of interest laws shows that states have dealt with conflicts in a variety of ways. Not all states have an explicit definition of “conflict of interest.” When definitions are provided, they usually refer to some discernible difference between an official’s personal interest and the public interest. Some, but not all states distinguish between “actual” or “potential” conflicts. Most states require disclosure of conflicts. Whether one can vote or otherwise take action when conflicts exist varies from state to state, and, in some cases depends upon the nature of the conflict. For additional information, see Peggy Kerns & Nicole Moore, *Conflict of Interest: What Is It? Can You Avoid It?*, 12 LEGISBRIEF 36. (Nat’l Conference of State Legislatures, August/September 2004).

At a minimum, Oregon law requires the disclosure of “actual” and “potential” conflicts, and provides sanctions for failure to do so.<sup>33</sup> The more controversial issue involves those circumstances under which a public official should be prohibited from taking action or making decisions. The methods of handling those conflicts of interest in Oregon are set out in ORS 244.120. In general, all “actual” and “potential” conflicts must be disclosed, but the actions to be taken after disclosure differ depending upon the public official’s office.

Under current law, members of the Legislative Assembly may take action upon both actual and potential conflicts after they are announced. ORS 244.120(1)(a). Other elected public officials and appointed officials serving on boards or commissions must generally abstain from participating in the discussion on or voting on the issue at hand where “actual” conflicts are involved, but may take action as a public official in those circumstances involving only “potential conflicts.” ORS 244.120(2). Other public officials (including employees and volunteers) must notify in writing the person who appointed them to office and “request that the appointing authority dispose of the matter giving rise to the conflict,” whether the conflict is “actual” or “potential.” ORS 244.120(1)(c).

4. *Narrative Description of Recommendations.*

The Government Ethics Work Group proposed several significant changes to Oregon’s conflict of interest laws, while leaving the general structure of those laws in place.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on conflicts of interest:

- a. Continue existing policies (a) requiring public officials to disclose all “actual” and “potential” conflicts and (b) allowing legislators, other elected public officials and appointed members of boards and commissions to participate fully in decisions or actions involving a “potential” conflict after disclosure.
- b. Impose significant new conflict restrictions on members of the Legislative Assembly by prohibiting a legislator with an actual conflict of interest from participating in consideration of a matter, but allowing participation in floor votes if permitted by the rules of the Legislative Assembly.
- c. Clarify limited circumstances in which other public officials are allowed to vote (but not participate in deliberations) despite a conflict of interest on the basis that the public official’s vote is “necessary.”

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<sup>33</sup> Oregon government ethics law covers two types of conflict of interest: “actual” conflicts and “potential” conflicts. Both are limited to conflicts involving “private pecuniary benefit.” See ORS 244.020(1) and (7) for definitions of these terms. According to a recent staff opinion from the Government Standards and Practices Commission, “the difference between an actual conflict of interest and a potential conflict of interest is determined by the words would and could.” Oregon Government Standards and Practices Commission, Advisory Opinion 03A-1007 (Nov. 21, 2003).

- d. Require disclosure of “actual” or “potential” conflicts arising from being a member or director of a 501(c) tax-exempt non-profit corporation, but allow a public official to act freely after such disclosure.<sup>34</sup>
- e. Expand the scope of “interests” covered under conflicts law to cover the interests of additional relatives and members of the household, including domestic partners and persons for whom the public official has a legal support obligation.

Additional Recommendations. Several additional recommendations were advanced, including recommendations to (a) amend the definition of financial gain to allow public officials to make recommendations (but not decisions) with regard to salary or compensation for themselves, relatives or household members when such recommendation is part of the official duties or responsibilities of the public official, (b) clarify that mere ownership of a mutual fund does not create a conflict of interest with respect to each stock that is part of the mutual fund<sup>35</sup> and (c) provide that judges are to comply with the Code of Judicial Conduct if there is a direct conflict between that code and the conflict of interest provisions of ethics law.

Continuing Controversies.

Legislative Counsel expressed concern that provisions in SB 494 regulating actual conflicts of interest for members of the Legislative Assembly (prohibiting all official participation and debate except for floor vote when there is an actual conflict) raise Art. IV, Section 9 and Article IV, Section 11 concerns under the Oregon Constitution.<sup>36</sup> While those arguments have some force, it is important to note that Oregon courts have not spoken directly on point. Indeed, existing conflict provisions that already impact the Legislative Assembly have been in place since the mid-1970's and have not led to challenges before the appellate courts on constitutional grounds.<sup>37</sup>

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<sup>34</sup> Present law does not require even disclosure in this circumstance.

<sup>35</sup> The Oregon Law Commission directed that its approval of this recommendation should be forwarded with the further notation that some further statutory clarification may be appropriate if there are mutual funds so specific and narrow as to create what a reasonable person would regard as a conflict of interest.

<sup>36</sup> Article IV, Section 9 of the Oregon Constitution contains the free speech and debate clause; and Article IV, Section 11 grants each house of the Legislative Assembly the power to determine its own rules. The basic contention is that the GSPC can not enforce such conflict of interest laws. Legislative Counsel's concern is based, at least in part, on an opinion by a 1999 Attorney General Opinion taking the position that the Legislative Assembly has exclusive authority to adjudicate a member for speech that takes place within performance of a member's official functions. See 49 Op Att'y Gen. 167 (1999). The concern of Legislative Counsel is two-fold: (a) that each legislative chamber may adopt rules that are inconsistent with the proposed statutory requirement and (b) that the Government Standards and Practices Commission may not enforce conflict of interest laws with respect to the legislative assembly.

<sup>37</sup> The Oregon Law Commission, while aware of the constitutional concerns expressed above, also took the position that there was value in articulating a standard of conduct which, if approved by the Legislative Assembly, would at least strongly encourage, if not require, that body to adopt internal rules that are consistent with general ethical standards applicable to conflicts of interest for other public officials.

**D. Individualized Personal Bias (SB 498)**

1. Issues Identified from Existing Law.

One of the basic postulates of ethical conduct in the public arena is that government employees and other public officials should treat everyone fairly. A public official's personal bias, either for or against, another person, should not have an impact on public policy or the actions or decisions of the public official. While state and federal civil rights laws already deal with bias toward individuals and classes on the basis of factors such as race, religion, gender and nationality, there are no statutory prohibitions that speak clearly to bias in terms of hostility or favoritism toward persons outside of recognized protected classes.

SB 498 makes changes to government ethics conflicts law applicable to public officials in Oregon. Those changes primarily concern what a public official must do and not do when the official has individualized personal bias, either for or against another person.

The significant issue of public policy involving individualized personal bias is:

- Whether the kinds of “conflicts” covered by conflicts laws should include matters of personal bias, as well as financial or “pecuniary” interests.

2. Issues Addressed.

The statutory recommendations in this bill address the issue identified above.

3. Alternative Approaches Considered.

The issue raised here is a fairly narrow, but important one: How should public officials handle personal bias towards others? Personal bias can best be regarded as a kind of conflict of interest, pitting the interest of the public official, whether direct or indirect, against the interest of the public in the fair and equitable treatment of everyone. The two basic approaches to dealing with conflicts of interest in general are to require disclosure of those conflicts or to restrict or prohibit a public official from taking action or making decisions in situations involving conflicts.<sup>38</sup> In this regard, the options for dealing with personal bias are similar to the options available for handling issues of financial gain or conflicts of interest.

At a minimum, Oregon law requires the disclosure of “actual” and “potential” conflicts, and provides sanctions for failure to do so.<sup>39</sup> As noted in the analysis of conflict of interest previously, the more controversial issue involves those circumstances under which a public official should be prohibited from taking action or making decisions. The

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<sup>38</sup> For additional information, see the analysis of conflicts of interest above.

<sup>39</sup> See ORS 244.120.

current legislative proposal resolves that issue by generally prohibiting public officials from taking action or making decisions where they have a personal financial interest or where there is an individualized personal bias for or against an identified person that may significantly influence the public official's choice of action.

4. Narrative Description of Recommendations.

Key Recommendation. The Oregon Law Commission made the following key recommendation on matters involving personal financial interests and individualized personal bias:

Require disclosure of a personal financial interest or individualized personal bias and prohibit public officials from taking action where that action may be significantly influenced by a personal financial interest or individualized personal bias for or against an identified person.

Additional Recommendations. The legislative proposal includes closely related provisions to make the key recommendation effective, including provisions; (a) requiring most public officials to provide notice of personal financial interest or individualized personal bias and refrain from acting in those circumstances; (b) requiring elected public officials and appointed officials serving on boards or commissions to publicly announce the nature of the personal interest or bias and refrain from participating in any discuss or debate in those circumstances;<sup>40</sup> and (c) requiring members of the Legislative Assembly to make disclosure and refrain from participating in discussion or debate, but allowing members to vote on the matter when it is considered by the Senate or House of Representatives.

Continuing Controversies

Extensive consideration was given to whether it was appropriate to expand the range of “conflicts” covered by ethics law to include matters of personal or prejudgment bias. The issue may remain somewhat controversial. While there was general agreement that personal bias should not color the judgment or actions of a public official, significant concerns were raised about being able to draft meaningful and enforceable standards and the application of such standards to smaller cities and counties. The specific statutory provisions of SB 498 dealing with this matter enjoyed substantial, but not universal, support before the Oregon Law Commission.

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<sup>40</sup> Elected public officials and members of boards or commissions may vote on a matter, but not otherwise participate, if the public officials vote is necessary.

## **E. Public Official Reporting Requirements (SB 497)**

### **1. Issues Identified from Existing Law.**

SB 497 would make changes to substantive, procedural and administrative aspects of ethics reporting requirements affecting public officials. Public disclosure through mandatory reporting may detect and deter violations that arise from self-dealing, conflicts of interest and failure to maintain impartiality.<sup>41</sup>

Under current law, certain statutorily specified public officials, including members of the Legislative Assembly, statewide elected officeholders and most city and county elected officials, must file annual statements of economic interest (SEIs). Most public officials are exempt from these reporting requirements.

There are a number of significant issues of public policy involving mandatory disclosures by public officials. The emphasis here is upon substantive issues about personal financial disclosure, including statements of economic interest and reporting of gifts, honoraria and other forms of financial gain. Some attention is also given to procedural and administrative aspects of reporting. The issues include:

- Who should be required to make disclosures?
- What kinds of information should public officials disclose?
- How much detail should be provided in the information disclosed?
- How frequently should this information be reported?
- How can public access to reports be improved?
- Should additional reporting requirements and procedures continue to exist for selected officials in the office of the State Treasurer?
- How should public officials be notified of reporting requirements and who should be responsible for providing that notice?

### **2. Issues Addressed.**

The statutory recommendations in this bill address each of the issues identified above.

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<sup>41</sup> Existing Oregon law calls for two basic kinds of “reports” to be prepared and filed with the Government Standards and Practices Commission. The first is a *Statement of Economic Interest* required of certain statutorily specified public officials. The second consists of those documents required in connection with lobbying: (a) *the Lobbyist Registration Statement*, (b) *the Individual Lobbyist Expenditure Report* and (c) *the Annual Entity Expenditure Report* (required of those who employed lobbyists). Statutory recommendations concerning lobbyist reporting requirements will be found in SB 496 below.

### 3. Alternative Approaches Considered.

Disclosure, like sunshine, is sometimes regarded as an antiseptic or disinfectant, protecting the public from self-serving conduct. Some observers are critical of reporting requirements, seeing them as costly, intrusive and largely ineffective.<sup>42</sup> Any system of disclosure must balance the gains of public disclosure against the costs of collecting and analyzing the information, enforceability and compliance. Additionally, other societal values such as reasonable expectations of privacy and the possibly “negative” impact of disclosure upon the willingness of some to participate in governmental affairs need to be taken into account. The discussion of reporting requirements in the Government Ethics Work Group took place within the context of this larger debate.

The Work Group determined that disclosures were appropriate. It also found that current reporting requirements were subject to reasonable criticism as overly complex and containing little timely or useful information. The Work Group determined that reporting requirements should not be abandoned, but instead those requirements should be modified to make any report more meaningful and useful.

The Work Group gave particular consideration to increasing the frequency of reporting as a way to make reports more meaningful and useful. The Work Group also recognized that the current SEI form contained a mix of two kinds of information that might be more useful and understandable if provided in two separate forms: (a) information about the general financial interests of public officials that was likely to be quite stable over time; and (b) other information about specific instances of financial gain from persons with a legislative or administrative interest that would be useful only if provided on a more contemporaneous basis. The Work Group gave additional consideration to making changes to the manner in which information concerning the financial interests of public officials is made available to the public, including expanded use of electronic databases.

### 4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on public official reporting requirements:

- a. Simplify the annual statement of economic interest (SEI) by requiring identification of the five most significant sources of income received by the public official and members of the household (instead of existing complex requirements involving income percentages) and by moving most financial gain reporting requirements out of the SEI and into a new separate reporting form to be filed quarterly (see subparagraph 3 below).<sup>43</sup>

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<sup>42</sup> For a perspective that is pessimistic about the value of financial disclosures, see G. CALVIN MACKENZIE, SCANDAL PROOF: DO ETHICS LAWS MAKE GOVERNMENT ETHICAL? 92 (2002).

<sup>43</sup> The Work Group decided not to require specific value or value range reporting for financial interests disclosed on the statement of economic interest, concluding instead that reporting the existence of the interest itself was sufficient to protect the public.

- b. Require all persons obligated to file annual statements of economic interest to also provide a separate quarterly report showing (a) gifts and monetary honoraria with a value exceeding \$15; (b) food, lodging or travel expenses with a value exceeding \$75; and (c) income greater than \$1000 from sources doing business with, or having a legislative or administrative interest in a governmental agency in which the public official serves or over which the public official would have authority.<sup>44</sup>
- c. Expand the number of persons required to file statements of economic interest by deleting existing exceptions for local officials in certain cities and counties.<sup>45</sup>
- d. Expand the definitions of “relative” and “member of household” to increase the scope of interests that must be reported by a public official.
- e. Require persons who provide gifts that exceed the reporting threshold to provide notice of the value of the gift to the recipient and to the Government Standards and Practices Commission in order to enhance the accuracy and certainty of reporting by public officials.
- f. Require public officials to report gifts and other reportable items using a good faith estimate of value when the public official is not given notice of the value of the item by the provider.
- g. Require the public body that a public official serves to promptly notify all newly elected or appointed public officials required to file statements of economic interest about the statutory requirement to file such reports.

The thrust of these recommendations is to enhance the clarity and usefulness of disclosures. This is accomplished primarily by creating two reports instead of the existing single report. By creating two reports each can be more carefully tailored to serve a specific purpose. The information required annually on the statement of economic interest is general information about economic status and interests—

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<sup>44</sup> General gift reporting is a new requirement, as is the requirement of a separate quarterly report. The other items to be reported on the quarterly report have generally been moved from the required annual statement of economic interest. Note: The Oregon Law Commission made a minor modification to the initial recommendation of the Work Group by deleting a requirement to report all honoraria and substituting a more limited requirement to report monetary honoraria valued over \$15 because of its concern about the difficulty, practicality and utility of determining and reporting value for modest, non-monetary honoraria.

<sup>45</sup> Exemptions currently exist for municipal judges, elected city or county officials, members of city or county planning, zoning or development commissions, and city or county managers in those city and counties in which either a majority of the votes in the 1974 general election establishing Oregon’s government ethics code was in opposition or where a majority of votes cast in the city or county at an election on the issue of filing statements of economic interest was in opposition. It is important for all cities and counties to have the same minimum standards. This historical exception affects very few public officials and was removed as an anomaly inconsistent with the goal of a comprehensive government ethics system that applied uniformly to public officials. An example of a city not currently covered is Keizer and examples of counties not currently covered include Gilliam, Grant, Wheeler and Morrow.

information that usually won't change significantly in the short term. The quarterly report is designed to disclose information that is primarily transactional in nature, such as giving and receiving gifts or travel expenses, where timely reporting is most important.

#### Additional Recommendations.

The Oregon Law Commission made several additional recommendations concerning reporting requirements. Those recommendations: (a) add names of household members (over age 18) and relatives (over age 18) not members of the household to the statement of economic interest form; (b) provide a thirty day period within which public officials may file amended statements of economic interest without penalty; (c) retain limited reporting requirements for members of congress and candidates for federal office; (d) continue to allow the GSPC to adopt by rule requirements that it be notified of actual or potential conflicts; (e) retain the basic procedural and administrative structure for handling additional Statement of Economic Interest forms (trading statements) from State Treasury officials, including the confidentiality of those statements; and (f) extend the basic procedural and administrative structure for handling required lobbying reports, as outlined in ORS 171.766 and 17.772, to general ethics reporting requirements in ORS Chapter 244, excluding only those documents which are confidential under other statutory provisions.

#### Continuing Controversies

After careful consideration, the Oregon Law Commission reached substantial consensus on each of the recommendations. However, some persons may remain concerned about the value of these disclosures, particularly of lower-valued items, when weighed against the intrusion into personal privacy and the cost of compliance, both to the public official and to the government.

#### **F. Nepotism (SB 495)**

##### *1. Issues Identified from Existing Law.*

Nepotism is the exercise of preferential employment practices, including hiring and promotion, based upon familial relationships. Hiring a relative creates, at a minimum, an appearance of favoritism based on relationship rather than on merit. SB 495 makes changes to ethics laws by adding new provisions applicable to the hiring, firing and supervision of relatives by public officials. For the most part those changes are designed to clarify existing law and practice, rather than to change the law in this area.

Oregon currently has no specific restrictions on nepotism in the public sector.<sup>46</sup> Instead, nepotism is generally restricted as improper financial gain (ORS 244.040) because of the financial gain to a family member. In addition, hiring a family member typically presents

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<sup>46</sup>Indeed, Oregon's civil rights laws significantly restrict the right of employers generally to discriminate against an employee or applicant for employment solely because of employment of another family member. ORS 659A.309.

a conflict of interest that must be disclosed (ORS 244.020). The basic question is whether more specific restrictions should be added to Oregon’s ethics law to enhance clarity and certainty, or whether the broad statutory provisions regulating financial gain (ORS 244.040) and conflicts of interest (ORS 244.020) are sufficient.<sup>47</sup> The issue has been most acute with regard to employment practices in the Legislative Assembly.

The two most significant issues of public policy involving nepotism are:

- Under what circumstances, if any, is it appropriate for a public official to be involved with employment decisions concerning relatives or in supervising relatives?
- Should the practice of allowing members of the Legislative Assembly to hire relatives be continued or prohibited?

2. Issues Addressed.

The statutory recommendations in SB 495 address each of the issues identified above.

3. Alternative Approaches Considered.

The Work Group closely examined nepotism prohibitions in federal laws and other state statutes or constitutions.<sup>48</sup> It considered three broad alternatives: (a) keeping the law as it is; (b) revising ORS 244.040 on financial gain and adopting guidelines, administrative rules or advisory opinions clearly stating that this provision also prohibits certain activities such as appointing or hiring of a relative to a public position; and (c) drafting a new statute prohibiting or restricting nepotism in the public sector. In considering these alternatives, the Work Group gave particular consideration to the potential impact of possible nepotism rules upon smaller communities<sup>49</sup> and the Legislative Assembly. With

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<sup>47</sup> ORS 244.040(1)(a) prohibits a public official from using or attempting to use his or her “official position or office to obtain financial gain or avoidance of financial detriment... for the public official or the public official’s relative, or for any business with which the public official or a relative of the public official is associated.” Similarly, “financial gain” for a relative would constitute either a “potential conflict of interest” or an “actual conflict of interest,” as those terms are defined in ORS 244.020. However, how this financial gain prohibition applies to nepotism isn’t always clear. On the one hand, The Government Standards and Practices Commission has interpreted ORS 244.040(1)(a) to mean that directly hiring or offering a contract to a relative, at least on the part of a school superintendent, would violate the prohibition on financial gain. GSPC Case No. D4-103EDC. On the other hand, it is common practice for members of the Legislative Assembly to hire relatives as staffers, although there is no statutory exception to the financial gain prohibition on point.

<sup>48</sup> The federal government and approximately half of the states specifically prohibit nepotism by statute or in the state’s constitution. The remaining states, including Oregon, have statutes that could be interpreted to include restrictions on nepotism, but lack the clarity of specific restrictions.

<sup>49</sup> Particular concerns were expressed about the difficulties that a ban or restrictions on nepotism might pose for small, insular rural communities where many people are likely to be related. The Work Group declined to provide a direct exception for small communities. However, provisions in SB 495 allowing a

regard to legislative employment, strong arguments were advanced in favor of continuing to allow employment of relatives on two grounds: (a) necessity due to low legislative salaries and a lack of adequate staff budgets; and (b) the high level of personal trust, confidence, and confidentiality expected of personal legislative staff. The Work Group generally found these arguments persuasive as to the practical necessity, if not the desirability, of continuing to allow members of the Legislative Assembly to hire relatives to serve on their personal staffs. Some attention was also given to the idea that nepotism restrictions should not make second-class citizens out of public officials generally or those who seek to hold public positions.<sup>50</sup>

The Work Group declined to recommend a broad ban on nepotism, beyond that already covered by ethics laws dealing with financial gain and conflicts of interest. However, it did conclude that some additional statutory provisions were appropriate to clarify existing law and practice on the subject, particularly with regard to employment of relatives by members of the Legislative Assembly.

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on nepotism:

- a. Require a public official to comply with conflict of interest rules in order for the public official to appoint, employ, promote, discharge, fire or demote a relative or member of the household.
- b. Allow exceptions for employment of personal legislative staff by a member of the Legislative Assembly and the appointment of unpaid volunteers by any public official.
- c. Generally, prohibit a public official acting in his or her official capacity from directly supervising a relative or household member, except for personal legislative staff and unpaid volunteers, but authorize a public body to adopt policies specifying when a public official may directly supervise a relative or household member.
- d. Clarify in statute that the public body served by a public official may hire that public official's relative or household member.

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public official to appointment relatives as volunteers, allowing a governmental body to appoint or employ the relative of a public official in circumstances where the public official would be prohibited from doing so, and allowing public bodies to adopt their own policies specifying when a public official may directly supervise a relative may indirectly mitigate this concern.

<sup>50</sup> While an outright ban on nepotism might be attractive because of its simplicity and clarity, such a ban would be inconsistent with the apparent policy behind Oregon's civil rights statute, ORS 659A.309, to not unduly interfere with the rights and opportunities for employment of persons, simply because they are related to someone else.

e. Expand the definition of “relative” for purposes of this statutory section only by adding “domestic partner” (and in-laws of domestic partners) and “member of household.”<sup>51</sup>

Additional Non-Statutory Recommendation. The Oregon Law Commission also specifically directed that this report indicate that the Law Commission recommends that the Legislative Assembly develop guidelines and restrictions regarding payment to family members who work as staff to prevent abuse of the exception for legislative staff. That recommendation is contained in the list of Non-Statutory Recommendations at the end of this Report.

### Continuing Controversies

Allowing legislators to hire and supervise relatives and members of the household is a matter of some continuing controversy. It is an exception to the general prohibition on financial gain for relatives of a public official, as well as to the proposed requirements for a public official to comply with conflict of interest provisions of ORS Ch. 244 and generally prohibiting the direct supervision of a relative or household member.

### **G. Subsequent Employment (HB 2594)**

#### 1. Issues Identified from Existing Law.

One of the basic postulates of ethical conduct in the public arena is that government employees and public officials shall not receive financial gain from public service apart from that specifically allowed by law, such as salary and expense reimbursement. Issues of employment and subsequent employment are relevant to ethics. Offers of employment and the prospects of future employment are forms of gain that may cause public officials to engage in conduct while in office that is self-serving and contrary to the public interest. Subsequent employment may allow a public official to take inappropriate advantage of relationships or confidential information after leaving public office.

HB 2594 makes changes to ethics laws regarding employment and subsequent employment of public officials in Oregon.<sup>52</sup> Significant issues of public policy involving employment and subsequent employment include:

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<sup>51</sup> These definitions are modified by various legislative proposals described in this report. As noted earlier, those proposals are not entirely consistent and will be reconciled by Legislative Counsel in the final form of proposed legislation.

<sup>52</sup> Oregon’s ethics laws contain two sections dedicated to the regulation of subsequent employment. ORS 244.040(3) prohibits any public official from receiving a promise of subsequent employment based on the understanding that the official’s vote or actions would be influenced by that promise. ORS 244.045 adds more stringent employment restrictions to a relatively few high-level state public officials, primarily administrative employees. Notably absent from this list are state legislative offices, statewide elected offices (except that of the State Treasurer), and any local elected or appointed offices. Those few public officials subject to ORS 244.045(1) are prohibited, for one year after leaving their positions, from

- Should public officials be prohibited from receiving promises of future employment from persons who have matters pending before the public official, whether or not there is any understanding that an official’s vote or actions would be influenced by that promise?
- Should some or all public officials be barred from accepting employment for some period of time after leaving public office from persons who have business before the public body served by the public official?
- Should some or all public officials be barred for some period of time from representing any person before the public body previously served by the public official (the “revolving door”)?<sup>53</sup>
- Should “revolving door” restrictions be applied to former legislators who seek to lobby the Legislative Assembly or executive branch officials?

2. Issues Addressed.

The statutory recommendations in HB 2594 address the issues identified above.

3. Alternative Approaches Considered.

Two basic approaches can be used to regulate future employment of public officials. The first approach is to prohibit a public official, while in office, from receiving or accepting offers or promises of future employment from persons who have business before the public official or the public body served by the public official. Such offers or promises are simply deferred financial gain that may lead the public official to engage in conduct in conflict with the public interest. The second approach is to prohibit public officials from appearing before the public body the official previously served, or more broadly from accepting employment with any person or entity that has had business before the public body the official served. The harm that this second approach seeks to prevent is more remote, uncertain, and controversial, consisting of the possible inappropriate use of established relationships or information acquired through public office.

The Work Group gave careful consideration to the appropriate breadth of possible restrictions on offers of both future employment and actual subsequent employment. The Work Group generally determined that employment restrictions should be drawn narrowly to deal with perceived harms, without unduly impacting on career opportunities available to public officials.

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becoming employees of or receiving any financial gain from any private employer engaged in the activity, occupation or industry over which the former public officials had authority.

<sup>53</sup> Revolving door statutes typically prevent former public officials from working as lobbyists or otherwise attempting to influence government entities with which they were affiliated for a certain amount of time after leaving office.

4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on employment-related matters:

- a. Retain the basic restriction, currently found in ORS 244.040(3), that prohibits public officials or candidates from soliciting or receiving promises of future employment based on any understanding that the official's vote or action would be influenced by the promise.
- b. Add a new provision prohibiting public officials or candidates from soliciting or receiving promises of future employment from persons who have matters pending before the public official in which the public official is personally and substantially participating.
- c. Prohibit former members of the Legislative Assembly from receiving money or other consideration for lobbying for one full session after the person ceases to be a member of the Assembly.
- d. Prohibit public officials, for a period of two years, from receiving a direct financial interest in a public contract authorized by the public official or by a board or committee of which the public official was a member at the time the contract was authorized, unless the public official didn't participate in the authorization.

Additional Recommendations. The Oregon Law Commission made additional recommendations to: (a) extend the existing statutory ban on using confidential information for personal gain to include use of confidential information by former public officials;<sup>54</sup> and (b) extend the existing prohibition on current public officials representing clients for a fee before the government body served by the public official to prohibit public officials from providing advice or other services to a client, for a fee, related to influencing action by the public body served by the public official.

Continuing Controversies.

The provision of HB 2594 that prohibits former members of the Legislative Assembly from engaging in lobbying activity for compensation was vigorously debated before the Work Group and the Oregon Law Commission and continues to be controversial. One Commissioner argued in particular that such a restriction was both unfair and unconstitutional. Legislative Counsel also expressed the view that a law that prohibits lobbying raises constitutional issues under Article 1, Section 8 of the Oregon Constitution

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<sup>54</sup> The Oregon Law Commission modified the Work Group recommendation by specifying that prohibitions on use of confidential information applied not only to personal gain for the public official, but to personal gain for any person. In other words, former public officials are not to make use of confidential information for any purpose. The Commission amendment is reflected in the proposed legislation.

and may be determined by a court to be unconstitutional.<sup>55</sup> Legislative Counsel’s analysis is based upon the *Robertson*<sup>56</sup> and *Fidanque*<sup>57</sup> line of cases. The Work Group and the Oregon Law Commission acknowledged those objections and concerns, but clearly did not concur in the underlying analysis. The constitutionality of the “revolving door” provision is best supported by an argument that the provision does not regulate lobbying itself, but rather compensation for lobbying. As such, it is aimed at a specific harm that the Legislative Assembly may regulate, is not overbroad, and, furthermore, is necessary to protect the legislative process and to prevent the use of public office for private financial gain.

## **H. Lobbying Reporting Requirements (SB 496)**

### **1. Issues Identified from Existing Law.**

The right to petition government is a fundamental right in the United States, found in both the U.S. Constitution (1<sup>st</sup> and 14<sup>th</sup> Amendments) and the Constitution of Oregon (Article I, Section 10). Lobbying is one way that right is exercised. Simply put, lobbying involves efforts to influence or attempt to influence public policy through persuading public officials to take or refrain from taking certain actions.

SB 496 would make changes to lobbying reporting requirements, with an emphasis on the registration and reporting requirements for lobbyists and the reporting requirements for those entities that employ lobbyists.<sup>58</sup> The authority to regulate lobbying in Oregon is vested with the Government Standards and Practices Commission.<sup>59</sup>

The most significant issues concerning reporting requirements generally have to do with who should report, the information to be reported, the timing and frequency of reports and the question of whether a centralized or common reporting system can and should be established.

Significant issues of public policy involving lobbying include:

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<sup>55</sup> Letter to Wendy Johnson, Deputy Director, Oregon Law Commission from Ted W. Reutlinger, Senior Deputy Legislative Counsel, dated November 9, 2006. Senior Deputy Legislative Counsel Reutlinger acknowledged that his analysis was based on a conservative reading of cases and that his “conclusions are not free from doubt.”

<sup>56</sup> *State v. Robertson*, 293 Or 402, 649 P.2d 569 (1982).

<sup>57</sup> *Fidanque v. State ex rel. Oregon Government Standards and Practices Commission*, 328 Or. 1, 969 P.2d 376 (1998).

<sup>58</sup> Recommendations on reporting requirements for public officials can be found in SB 497 above.

<sup>59</sup> ORS 244.290(5) provides authority to the Oregon Government Standards and Practices Commission to adopt rules necessary to carry out its duties to regulate lobbying. Existing substantive provisions on regulation of lobbying are to be found in ORS Chapter 171, rather than in ORS Chapter 244. See ORS 171.725 to 171.785 and ORS 171.992 for those substantive provisions.

- What kinds of activities should be considered “lobbying?”
- Should lobbyists be required to register and report on their expenditures?
- Should those who employ lobbyists be required to report?
- What expenditures should be reported and how much detail should be required in lobbying reports?
- How frequently should information be reported by lobbyists and those who employ lobbyists?
- How can public access to reports be improved?

2. Issues Addressed.

The statutory recommendations in this bill address each of the issues identified above.

3. Alternative Approaches Considered.

There was general agreement that those who engage in lobbying should be required to register and report their activities.<sup>60</sup> However, existing Oregon law provides a limited definition of lobbying and regulates only lobbying that focuses upon legislative action.<sup>61</sup> The Work Group considered expanding the definition of lobbying to include all efforts to persuade public officials at the state and local level.<sup>62</sup> That approach was rejected in favor of clarifying that lobbying includes not only efforts to influence legislative officials, but also efforts to influence executive branch officials, including the Governor, on matters involving legislative action. Consideration was given to existing exceptions and thresholds to registration and reporting requirements, as well as to expanding the exceptions. Particular attention was given to clarifying and harmonizing the reporting requirements for lobbyists, those who employ lobbyists, and public officials. Present law

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<sup>60</sup> There are significant constitutional free speech issues which make it difficult, if not impossible, to prohibit lobbying or to regulate the content and substance of lobbying activity. Therefore, with regard to lobbying, even more so than such topics as campaign finance or conflicts of interest, governments tend to rely heavily on reporting to maintain ethical behavior while balancing the rights of persons to petition government and speak freely on political matters.

<sup>61</sup> According to ORS 171.725 (8) “Lobbying,” means “influencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of others to influence or attempt to influence legislative action or attempting to obtain the good will of legislative officials.” (underlining added).

<sup>62</sup> The rationale for such expansion rests on the fact that many governmental entities, in addition to the Legislative Assembly, deal with large budgets and have significant decision-making authority subject to influence. The list includes state executive agencies, as well as larger cities, counties, school district and other entities such as Tri-Met, the Port of Portland, the Oregon University System and OHSU.

has different reporting thresholds for those who give and those who receive gifts, honoraria, food, lodging, travel and other forms of regulated gain.

The Work Group gave particular consideration to increasing the frequency of reporting. More contemporaneous reporting will enhance accountability by increasing public access to relevant current information. The Work Group gave additional consideration to making changes to the manner in which data concerning lobbying expenditures and financial interests are made available to the public, including expanded use of electronic databases.

4. *Narrative Description of Recommendations.*

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations on lobbying reporting requirements:

- a. Amend the definition of lobbying to clarify that it includes efforts to influence the executive branch on legislative matters.
- b. Clarify that a lobbyist must file a separate registration for each client represented by the lobbyist once the registration threshold is reached; and that the “24-hour rule” and \$100 spending thresholds for initial registration are aggregate, and not client-by client, requirements.
- c. Require that those who employ lobbyists report (1) aggregate payment for lobbying activities, (2) total amounts paid to each lobbyist or lobbying firm, and (c) all gifts to public officials over \$15 and other expenditures on behalf of public officials over \$75 on an itemized basis, consistent with reporting requirements for public officials.
- d. Continue to require lobbyists or lobbying firms to report the total amount of money expended by the lobbyist or lobbying firm for food, refreshments and entertainment, but delete current requirements to report total expenditures on printing, postage, telephone, advertising, public relations, education and research, and miscellaneous items.
- e. Require lobbyists or lobbying firms to report gifts to public officials over \$15 and expenditures on behalf of public officials over \$75 on an itemized basis, consistent with reporting requirements for public officials.
- f. Lobbyist expenditure reports should be filed on a quarterly basis.<sup>63</sup>
- g. Expenditure reports for those who employ lobbyists should be increased from an annual basis to a quarterly basis to match the filing requirement for lobbyist expenditure reports.

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<sup>63</sup> The existing reporting requirement is three times during odd-numbered years and two times during even-numbered years.

- h. Clarify that a registered lobbyist is not required to file an expenditure report for a client where the lobbyist is not being compensated and does not exceed either a 24-hour time or \$100 expenditure threshold for that client.
- i. Increase the maximum fine for violations of lobbying regulations from \$1,000 to \$5,000 and authorize a fine for late filing of lobbyist registration forms of \$10 per day for the first 14 days and \$50 per day thereafter, up to a maximum of \$5,000.
- j. Direct the Government Standards and Practices Commission to provide notice to the Legislative Assembly of lobbying law violations and further direct the Commission to adopt rules to determine when violations based solely on late reporting must be sent to the Legislative Assembly.
- k. Amend the list of those persons exempted from registering as a lobbyist by adding the following: the deputy chief of staff and deputy legal counsel for the Governor, the chief of staff to the Office of State Treasurer, and Oregon Law Commissioners and staff conducting the Commission's law revision program under ORS 173.315 to ORS 173.357.

Additional Recommendations. The Oregon Law Commission made additional recommendations to: (a) clarify that a lobbyist must either amend an existing registration or file an additional registration within 3 days of acquiring a new client to identify that client and that all other changes in the information provided on a lobbyist registration statement must be revised within 30 days of a change; (b) restructure the complaint investigation and review process to parallel proposed revisions of the process for investigating and reviewing complaints of general ethics laws violations in ORS Chapter 244; and (c) direct the Government Standards and Practices Commission to prescribe by rule forms for lobbyist registration and expenditure statements.

Continuing Controversies.

The recommendations addressed by this bill were thoroughly discussed by the Government Ethics Work Group and the Oregon Law Commission. There is broad support for clear, meaningful and enforceable lobbying registration and reporting requirements.

**I. Organization Structure, Rulemaking and Advisory Opinions; Sanctions; Funding; and Remedies (HB 2595)**

This bill addresses four main topics: (a) GSPC organization structure, rulemaking and advisory opinions; (b) sanctions for ethics violations; (c) GSPC funding; and (d) remedies (status of official action). The analysis of each topic is treated separately below.

## **Organization Structure, Rulemaking and Advisory Opinions**

### 1. *Issues Identified from Existing Law.*

The first sections of this bill deal primarily with the organizational structure of the GSPC, as well as rulemaking and advisory opinions of that body. Many of the proposed changes are primarily technical in nature, designed to streamline and clarify the process for developing administrative rules and advisory opinions concerning government ethics. A major substantive change involves establishment of a “three-tier” system of advisory opinions and advice with significant differences in the extent to which public officials can rely upon those opinions and advice depending upon the tier involved.

Significant issues of public policy involving organizational structure, rulemaking and advisory opinions include:

- What criteria and processes should be used for selection of GSPC board members and chairperson?
- Should the GSPC be more insulated from the political process and, if so, how can that be accomplished?
- Should the overall location of the GSPC within state government be changed to enhance its independence, allow its functions to be performed more efficiently and/or insulate it from possible funding pressure?
- Should more use be made of the administrative rulemaking process in order to ensure public input to ethics decisions?
- Should the process for issuing ethics advisory opinions be revised and streamlined?
- To what extent should public officials be able to rely upon formal and informal staff advice and opinions on ethical issues to guide future conduct?

### 2. *Issues Addressed.*

The statutory recommendations in HB 2595 address the issues identified above.

### 3. *Alternative Approaches Considered.*

The Government Ethics Work Group gave considerable attention to the organizational structure of the ethics governing entity, the Government Standards and Practices Commission. Consideration was given to the independence of the governing entity, the governing structure of that entity, the impartiality of its decision-making processes, and

its representational character.<sup>64</sup> Additional consideration was given to relocating the governing entity, or at least some of its key functions, to other locales within state government, including location under a non-partisan controller. A recommendation on that matter was deferred pending legislative consideration of a proposal from the Public Commission on the Oregon Legislature to establish a new office of Controller under the Secretary of State with responsibility for conducting ethics investigations. The Oregon Law Commission directed that this Report specifically emphasize the Commission's endorsement of appropriate changes in the provisions of HB 2595 and HB 2596 to locate the investigation function in a new office of Controller if the Legislative Assembly adopts the Public Commission's recommendation on this point. The Work Group and the Oregon Law Commission also considered changing the name of the GSPC to the Oregon Government Ethics Commission, but declined to make such a recommendation.

Discussion of rulemaking centered around the issue of whether the Government Standards and Practices Commission should be required to make more use of the rulemaking processes of Oregon's Administrative Procedures Act (ORS Chapter 183), rather than relying so heavily upon formal and informal advisory opinions. Attention was also given to eliminating the agency's current ability to exempt certain "gifts" from statutory coverage by rulemaking. In terms of advisory opinions, the focus was primarily on two issues: clarifying and streamlining the process for issuing advisory opinions, and specifying the extent to which public officials could rely upon the several different types of advisory opinions.

#### 4. Narrative Description of Recommendations.

Key Recommendations. Based on the foregoing, the Oregon Law Commission made the following key recommendations:

- a. Require the GSPC to consider the public interest and both prior and future sanctions applied in other government proceedings when deciding whether to proceed with an investigation or impose sanctions.
- b. Require the GSPC to conduct an annual review of existing rules and the need for additional rules to address matters of broad or recurring interest.
- c. Allow state agencies and statewide associations of governmental entities to submit ethics policies applicable to their members to the GSPC for approval. Upon approval, conduct permitted by such policies would be exempt from sanctions by the GSPC.
- d. Eliminate statutory authority for the GSPC to exempt any kind of "gift" from gift limitations of ORS 2444.040 by rulemaking.

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<sup>64</sup> Some attention was given to whether ethics laws should be enforced on the local level and to the possibility of establishing a separate structure for dealing with matters involving the Legislative Assembly. Those ideas were ultimately rejected in favor of maintaining a unified ethics structure operating on a statewide basis as the most appropriate way to organize the administration of government ethics.

e. Consolidate rulemaking provisions of ORS Chapter 244 into one statutory section to the fullest extent possible.

f. Require all formal “advisory opinions” to be issued in writing and specifically identified as either a “commission advisory opinion,” or a “staff advisory opinion.” Require that any advise issued orally by Commission staff and any written staff opinion (including e-mail) that is not designated as a “staff advisory opinion” shall be considered “staff advice.”

g. Create a three-tier system with regard to ability of public officials to rely upon formal written opinions and other staff advice by providing that: (a) a requestor or person similar situated acting in good faith upon a written commission advisory opinion that has not been amended or revoked shall not be sanctioned for actions allowed under the commission advisory opinion; (b) good faith reliance by a requestor on a staff advisory opinion, unless material facts were omitted or misstated, shall be taken into account by the Commission in determining penalties; and (c) the Commission may, but is not required, to consider “staff advice” when imposing sanctions.

h. Require the GSPC to conduct “accuracy audits” on a sample of all reports submitted to it.

Additional Recommendations. The Oregon Law Commission made additional recommendations to (a) limit members of the Oregon Government Standards and Practices Commission to one four-year term plus the unexpired portion of any term to which they are initially appointed, (b) grant specific statutory authority to the GSPC to adopt rules necessary to carry out all of its duties, (c) require the GSPC to adopt by rule guidelines or standards clarifying what constitutes a single or multiple violations of ethics laws and guidelines for determining sanction amounts, (d) establish time limits within which “commission advisory opinions” and “staff advisory opinions” are to be provided, and (e) fund a publicly accessible and searchable online database.

In addition, the Oregon Law Commission, as noted above, directed that this report specifically emphasize the Law Commission’s endorsement of appropriate changes in the provisions of HB 2595 and HB 2596 to locate the investigation function in a new office of Controller if the Legislative Assembly adopts the Public Commission’s recommendation on this point.

Continuing Controversies.

The recommendations addressed by this portion of the bill were carefully discussed and appear to have resolved each issue addressed.

## Sanctions

### 1. Issues Identified from Existing Law.

HB 2595 also addresses issues involving sanctions for ethics law violations. Sanctions are those penalties, civil and criminal, levied against an individual who violates government ethics laws.

Significant issues of public policy involving sanctions include:

- Should existing monetary sanctions, which have remained essentially unchanged since the government ethics laws were written in the 1970's, be increased?
- Should the ethics governing authority have greater discretion in the kinds of sanctions that it may impose?
- Should public officials be able to “opt out” of the administrative hearing process by requiring that a case be brought in circuit court?

### 2. Issues Addressed.

The statutory recommendations in this bill address the issues identified above.

### 3. Alternative Approaches Considered.

This proposal deals with two discrete topics: changes to the amount of sanctions and the “opt out” issue. With regard to the “opt out,” consideration was given to retaining the “opt out” in its present form, the entire elimination of the “opt out”, and retaining a limited version of the provision.” After some discussion, the Commission on a split vote approved a compromise provision that would establish a three-step process for use of the “opt out.”<sup>65</sup> With regard to sanctions against individual public officials, consideration was given to maintaining existing penalty levels or increasing them to take account of inflation over the past 30 years. Consideration was also given to establishing daily maximum penalties for late filing, particularly if maximum penalty levels were increased.

### 4. Narrative Description of Recommendations.

Key Recommendations. The Oregon Law Commission made the following key recommendations on sanctions:

- a. Increase maximum civil penalties from \$1,000 to \$5,000.

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<sup>65</sup> The “opt out” issue is described in detail in the analysis of HB 2596 below, and will not be further reviewed here, except to note that the Oregon Law Commission directed that provisions of this bill dealing with the “opt out” conform to the “opt out” recommendations in HB 2596 below. For additional information see the discussion of the “opt out” in connection with HB 2596 below.

- b. Allow the Government Standards and Practices Commission to issue a written reprimand in lieu of imposing a civil penalty.
- c. Direct the Government Standards and Practices Commission to notify the public body served by a public official if it determines that the public official violated provisions of government ethics law.
- d. Replace the statutory provision allowing public officials to elect to have the Commission file a lawsuit in Marion County Circuit Court with provisions establishing the following process. Initially, a GSPC notice of intent to impose a penalty would trigger a contested case proceeding under the Administrative Procedures Act (APA). If the public official chooses to exercise the option to proceed in Marion County Circuit Court, the matter would proceed in court unless the GSPC exercised its option to have the matter still proceed as an administrative proceeding. In order to exercise this last option, the GSPC would have to delegate final order authority to the OAH ALJ for this proceeding.<sup>66</sup>

#### Additional Recommendations.

The Law Commission made additional recommendations to (a) consolidate provisions specifying that requirements and penalties under government ethics law apply in addition to requirements and penalties applicable under other laws, (b) clarify that conflicts of interest requirements for members of Oregon Investment Council are subject to investigation and sanction by the Government Standards and Practices Commission, (c) revise the definition of “public servant” in criminal laws to include “public officials” subject to government ethics laws, and (d) specify that criminal penalties for false swearing apply to verified statements of economic interest.

#### Continuing Controversies.

The recommendations on sanctions addressed in HB 2595 were carefully discussed and appear to have resolved any remaining controversies concerning sanctions.

#### **Funding**

##### 1. *Issues Identified from Existing Law.*

HB 2595 also addresses the important topic of funding for the Government Standards and Practices Commission. Significant issues of public policy involving funding include:

- How should a general lack of adequate funding be handled?
- How (and by whom) should the agency be funded?

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<sup>66</sup> See also HB 2596 below, which contains this same recommendation.

- How can the agency's funding be insulated from undue political pressures?

2. Issues Addressed.

The statutory recommendations in this bill address the funding issues identified above.

3. Alternative Approaches Considered.

The funding issues identified above are inextricably interwoven. The Government Standards and Practices Commission is widely, if not universally, perceived as underfunded. There is also a fairly widespread perception that this underfunding is due, at least in part, to past legislative dissatisfaction with the agency's administration and its decisions. The Government Ethics Work Group and the Oregon Law Commission considered a variety of ways to deal with these interrelated concerns. Consideration was given to continued funding through the General Fund appropriation process, to the use of fees for services, and to funding the agency through some form of local assessment. Moving agency funding away from the General Fund was considered as a way to reduce undue political pressures. Consideration was also given to other options to insulate agency funding from political pressure, including embedding budgetary provisions into the Oregon Constitution instead of statute, creating a "blue ribbon" budgetary oversight committee of state-wide elected officials that would recommend an appropriate budget level, and establishing a separate fund with continuous appropriations.

4. Narrative Description of Recommendations.

Key Recommendations. The following key recommendations on funding are advanced by the Oregon Law Commission for consideration by the Legislative Assembly:

- a. Appropriate to the GSPC for the biennium beginning July 1, 2007, from the General Fund, an amount to be established by the Legislative Assembly.
- b. Establish a statutory procedure requiring the Department of Administrative Services to determine on a biennial basis thereafter the amount of money needed for the next biennium to enable the GSPC to maintain current service levels and appropriating that amount from the General Fund to the GSPC, subject to allotment under ORS 291.230 to 291.260.

Additional Recommendations. A determination was made that the Oregon Law Commission would not recommend a specific budget level, in part because to do so would be outside the ability and expertise of the Work Group and the Commission.<sup>67</sup> Additionally, any budget level would be dependent upon how many of the proposals

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<sup>67</sup> See Memorandum from Wendy Johnson, Deputy Director of the Oregon Law Commission, to Ethics Work Group #2, dated September 21, 2006, indicating that the Legislative Fiscal Office (LFO) and GSPC staff concurred in that analysis, but that recommending approximate FTE's and changes in administrative functions that have costs could be useful to the LFP and the Legislative Assembly. The memorandum proceeds to set out approximate FTEs and cost changes needed to adequately fund the GSPC.

forwarded by the Oregon Law Commission are actually enacted into law. Instead, the Oregon Law Commission, in addition to the funding proposal set forth here, has advanced non-statutory recommendations that the Legislative Assembly adequately fund the GSPC generally and fund all specific positions identified as necessary for the GSPC to carry out its responsibilities. See Section V below for the complete list of non-statutory recommendations.

As additional guidance to the Legislative Assembly on this matter, the Government Ethics Work Group asked that the following information on approximate staffing levels and likely items of additional expenditure be forwarded to the Legislative Assembly. It is provided as an example, rather than as a specific recommendation, of what it might reasonably take to meet the non-statutory recommendation that the Legislative Assembly adequately fund the GSPC.<sup>68</sup>

#### Estimated Staffing Levels<sup>69</sup>

- 1 FTE for an Executive Director
- 1 FTE for an Office Assistant/Receptionist
- 1-2 FTE for a Compliance Officer/Information Systems Specialist/Electronic Database Manager
- 1-2 FTE for Investigators
- 1 FTE for a Training Specialist
- Continued appropriation of funds for Legal Counsel

#### Estimated Additional Cost Factors

- Office Space (to accommodate increased staff)
- Computers, Phones, Office Equipment (to accommodate increased staff)
- Printing, mailing, and handling costs (due to increased frequency of reporting and other changes in operating procedures)
- Database software and additional computer-related expenses
- Public and Distribution of the ethics manual

#### Continuing Controversies.

The funding recommendations addressed by this bill were carefully discussed and appear to have resolved, at least in part, funding issues.

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<sup>68</sup> For a full description of this information on approximate FTEs and cost changes. See the Memorandum from Wendy Johnson, Deputy Director of the Oregon Law Commission, to Ethics Work Group #2, dated September 21, 2006.

<sup>69</sup> The GSPC's budget for the current biennium is \$653,68 for 3 FTE (1 Executive Director, 1 Executive Assistant, and 1 Investigator).

## **Remedies (Status of Official Action)**

### 1. *Issues Identified from Existing Law.*

Unlike sanctions, which focus on penalties levied against a person for ethical violations, remedies broadly concern the rights of government and third parties when a public official takes an action. The statutory proposal in HB 2595 addresses a fairly narrow issue involving the status of official action: the validity or invalidity of actions taken by public officials under circumstances where the official is legally disqualified to act.

Significant issues of public policy involving the status of official action where there are ethics law violations include:

- Should government ethics law more clearly identify the circumstances under which actions taken by or with the participation of a legally disqualified public official are either valid or invalid?

### 2. *Issues Addressed.*

The statutory recommendations in this bill address the issue identified above.

### 3. *Alternative Approaches Considered.*

A particularly difficult issue to handle from both conceptual and drafting perspectives involved whether statutory changes should be adopted more clearly delineating the effect of action by a legally disqualified public official.<sup>70</sup> Some consideration was given to detailing those specific circumstances under which actions should be invalid, but it was determined that trying to describe those multiple circumstances in statute would be exceedingly difficult if not impossible. Instead, the approach recommended by the Oregon Law Commission identifies three specific circumstances in which an action is valid. It leaves any further determination of validity or invalidity, or of the rights and remedies of persons unchanged.

### 4. *Narrative Description of Recommendations.*

**Key Recommendation.** The Oregon Law Commission made a single recommendation on this matter:

Specify in statute that action taken by a legally disqualified public official is valid in three specific situations as follows: (a) where the official is disqualified solely for failure

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<sup>70</sup> The only applicable existing statutory reference is contained in ORS 244.130(2) which states: that [N]o decision or action of any public official or any board or commission on which the public official serves or agency by which the public official is employed shall be voided by any court solely by reason of the failure of the public official to disclose an actual or potential conflict of interest.” This negative reference, without further explanation, leaves the legal effect of actions by public officials largely to judicial interpretation of common law principles.

to disclose a potential conflict of interest; (b) where the action is reaffirmed by the public body the official serves or a superior public official in writing and including a description of reasons for disqualification; or (c) where the official's only participation was to cast a vote in making a collective decision and the vote was either unnecessary or allowed by statute as a matter of necessity.

#### Continuing Controversies.

The adoption of this recommendation on the status of official action was the subject of debate and some difference of opinion, which may make it a matter of continuing controversy.

### **J. Adjudication Processes/Training and Legal Expense Trust Fund (HB 2596)**

This bill addresses two major topics: (a) the adjudication procedures and educational responsibilities of the GSPC; and (b) creating a statutory mechanism that allows public officials to establish legal expense trust funds to defray legal expenses incurred in defending against charges of ethics violations.

#### Adjudication Procedures and Training

##### 1. *Issues Identified from Existing Law.*

HB 2596 deals in part with ethics adjudication procedures and educational responsibilities of the Government Standards and Practices Commission. It makes substantive changes to existing adjudication procedures and streamlines adjudication statutes for greater readability and understanding. In terms of education, this bill consolidates statutory provisions regarding a required manual on government ethics and requires distribution of the manual to all public officials to the extent feasible.

Significant issues of public policy involving adjudication procedures and training include:

- Should time limits for each phase of the ethics complaint investigation process be increased?
- Should the preliminary phase of an investigation of a candidate for public office be permitted to be delayed until after a pending election if the election date is soon?
- Should parties charged with ethics violations continue to be able to “opt out” of contested case proceedings before an administrative law judge and instead have a matter brought to circuit court before a judge?

- Should any changes be made in the role and responsibility of the GSPC in: (a) preparing and distributing information about government ethics; and (b) providing ethics training to public officials?

2. Issues Addressed.

The statutory recommendations in this bill address the issues regarding adjudication processes and training identified above.

3. Alternative Approaches Considered.

The Government Ethics Work Group carefully considered whether substantive changes were needed in adjudication procedures of the GSPC. With two exceptions, it determined that substantive change was not needed, but that reorganization, clarification and comprehensive codification of those procedures would be helpful. The two exceptions involved extending procedural time limits and amending the so-called circuit court “opt out” provision. With regard to time limits, particular consideration was given to ensuring that time limits were long enough to mesh reasonably with the Commission’s formal meeting schedule, while protecting a public official’s interest in prompt resolution of a matter before the GSPC. With regard to the “opt out,” consideration was given to retaining the “opt out” in its present form, the entire elimination of the “opt out”, and retaining a limited version of the provision.”

The Work Group discussed the "opt out" issue at some length and recommended the entire elimination of the "opt out." This determination was based, in part, on the fact that the “opt out” provision had been enacted before the creation of the Office of Administrative Hearings (OAH). Creation of the OAH has altered the process for administrative agency contested case proceedings by having a cadre of independent administrative law judges (ALJs) preside over hearings and issue proposed final orders. Any changes made to proposed final orders by the final agency decision maker must be explained in the final order and any changes made to determinations of historical fact will be reviewed *de novo* (i.e. the court will reach its own determination anew) by the reviewing court, if challenged. The Work Group determined that these changes have altered the process sufficiently to bring into question the continuing need for the “opt out” provision. The Work Group determined that there were no compelling reasons for having GSPC proceedings handled uniquely after the advent of the OAH<sup>71</sup> and that the additional costs required for proceeding in circuit court were not justified.<sup>72</sup> While there was some support expressed for retaining the "opt out" on the basis of a perceived lack of fairness in the administrative hearings process to persons accused of violating ethical standards, the Work Group supported eliminating the “opt out” provision for three

<sup>71</sup> Other state agencies are required to use the general contested case procedures of ORS Chapter 183.

<sup>72</sup> In addition to the higher costs generally associated with litigation before the courts, some attention was also given to the cost impact on the GSPC of requiring attorney fee awards to a prevailing public official in ethics administrative hearings and judicial proceedings, as currently provided in ORS 244.400. GSPC staff indicated that concern about possible attorney fee awards was a significant factor leading it to settle cases. While the attorney fee provision is controversial, no recommendation to eliminate it was advanced here.

reasons: (a) the lower cost and efficiency of the administrative process; (b) consistency with the adjudication process used by other state agencies; and (c) the fact that the current independent administrative hearings structure, created after the “opt out” was established, should resolve concerns about fairness in the administrative hearings process.

When this issue came before the full Commission, alternative proposals were presented to: 1) retain the “opt out” provisions; or 2) make all orders issued by the OAH administrative law judges final orders in GSPC proceedings. After some discussion, the Commission on a split vote approved a compromise provision that would establish a three-step process. A notice of intent to impose a penalty issued by the GSPC would initiate a regular contested case process that would proceed through a hearing conducted by an OAH ALJ with the final order to be issued by the GSPC. If the charged public official wished instead to proceed in circuit court (i.e., “opt out”), then the public official could so request and cause the matter to proceed in circuit court. The GSPC could then either acquiesce to proceeding in circuit court or exercise the GSPC's option to have the matter proceed in an administrative proceeding. In order to exercise this last option, the GSPC would have to delegate final order authority to the OAH ALJ for this proceeding.

4. *Narrative Description of Recommendations.*

Key Recommendations. The Oregon Law Commission made the following key recommendations on adjudication procedures and training:

- a. Increase the period of time allowed for the GSPC to conduct a Preliminary Review of a matter from 90 to 135 days.
- b. Increase the period of time allowed for the GSPC to move from a finding of cause to the beginning of any contested case proceeding (called the Investigatory Phase) from 120 days to 180 days.
- c. Replace the statutory provision allowing public officials to elect to have the Commission file a lawsuit in Marion County Circuit Court with provisions establishing the following process. Initially, a GSPC notice of intent to impose a penalty would trigger a contested case proceeding under the Administrative Procedures Act (APA). If the public official chooses to exercise the option to proceed in Marion County Circuit Court, the matter would proceed in court unless the GSPC exercised its option to have the matter still proceed as an administrative proceeding. In order to exercise this last option, the GSPC would have to delegate final order authority to the OAH ALJ for this proceeding.<sup>73</sup>
- d. Combine and streamline statutory provisions dealing with a government ethics manual.

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<sup>73</sup> See also HB 2595 above, which contains this same recommendation.

Additional Recommendations. The Government Ethics Work Group made an additional recommendation to delete lobbyists from the coverage of ORS 244.340 dealing with education programs (since GSPC does not have an education program for lobbyists).

Continuing Controversies.

Recommendation c above is a compromise developed and approved by the Oregon Law Commission. It attempts to resolve the “opt out” controversy by allowing the GSPC to require a matter to be handled through the administrative hearing process, but only if it agrees that the administrative hearing decision will be final. That compromise enjoyed substantial, but not universal support within the Oregon Law Commission, and may continue to be somewhat controversial.

Legal Expense Trust Fund

1. Issues Identified from Existing Law.

HB 2596 also establishes a statutory mechanism that allows a public official accused of an ethics violation to create a legal expense trust fund to defray legal expenses involved in defending against those accusations. It makes conforming changes to other provisions of ORS Chapter 244 to clarify that contributions to a legal expense trust fund are neither a prohibited form of financial gain, nor a “gift” to the public official.

There are two significant issues of public policy involving a legal expense trust fund:

- Is it appropriate to provide a statutory mechanism by which a legal expense trust fund can be created through which certain legal expenses of a public official may be paid for by others in circumstances where campaign contributions and ordinary gifts could not be used for this purpose?
- If a legal expense trust fund is an appropriate device, how can such a legal expense trust fund be structured so that (a) the source and amount of contributions and the amount of expenditures are disclosed in a timely manner and (b) contributed funds cannot otherwise be used for the personal financial or pecuniary gain of the public official?

2. Issues Addressed.

The statutory recommendations in this bill address the issues identified above.

3. Alternative Approaches Considered.

The issue of creating a legal expense trust fund arose in the context of discussing the financial burden placed upon a public official in responding to an allegation that the official violated government ethics law. The discussion was pushed forward by a proposed change in Oregon’s campaign finance laws. Under recommendations to change

Oregon’s campaign finance law, the ability of a public official to use campaign contributions to pay legal expenses will be sharply reduced.<sup>74</sup> Brief consideration was given to allowing campaign contributions to be used for this purpose or, alternatively, to simply defining direct contributions to a public official for legal expense purposes as an allowed form of financial gain. Both alternatives were rejected, at least in part on the basis of concerns about adequate disclosure and preventing personal use. The approach adopted here is modeled after a trust available to members of the U.S. Congress, in which an independent trustee with fiduciary responsibilities has control of trust funds, may distribute them for specified purposes, and is responsible to ensure that proper accounting and public disclosure take place.

4. *Narrative Description of Recommendations.*

Key Recommendations. The Oregon Law Commission made the following key recommendations regarding a legal defense trust fund:

- a. Allow public officials, upon authorization by the Oregon Government Standards and Practices Commission, to establish legal expense trust funds to defray legal expenses in civil, criminal or other legal proceedings brought by a public body that relates to or arises from the course and scope of duties of the person as a public official.
- b. Require that any trust established for this purpose and authorized by the Government Standards and Practices Commission have a written trust agreement incorporating by reference the operative provisions of the legal expense trust fund statute and containing affidavits from both the public official and trustee that they will comply with the provisions of that statute.
- c. Require the trustee of a legal expense trust fund to (a) establish and maintain a single bank account for the trust, and (b) file a quarterly statement with the Government Standards and Practices Commission showing contributions received and expenditures made by the trust, with identifying information.
- d. Require any contributed funds that are not expended for appropriate purposes to be returned to contributors, on a pro rata basis, not later than 30 days after a trust fund is terminated. In the event attorney fees are awarded to the public official, require any sum awarded to be distributed first to pay outstanding legal expenses, then pro rata to contributors, with any remaining amount distributed to the public official (or tax exempt organization if required by the trust agreement).

Additional Recommendations. The Law Commission made additional recommendations to exclude contributions to a legal expense trust fund from the definition of “gift” in ORS 244.020 and to add such contributions as an allowed form of financial gain.

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<sup>74</sup> Although no change is proposed by the Oregon Law Commission in the current law (ORS 244.400) that allows a prevailing public official to recover attorney fees against the GSPC, early discussion of eliminating the attorney fee provision also played a role in developing the legal expense trust fund proposal.

## Continuing Controversies.

The legal defense trust fund recommendations addressed by HB 2596 were carefully discussed. The recommendations appear to have resolved any remaining concerns about providing adequate public disclosure and preventing contributed funds from being used for personal purposes other than specified legal expenses.

## **IV. SECTION-BY-SECTION ANALYSIS OF LEGISLATIVE PROPOSALS**

### **A. HB 2597 (Campaign Finance) (Use of Campaign Contributions)**

HB 2597 would make changes to the election law statutes found in ORS Chapter 260. The provisions focus on the use of campaign contributions and the treasurer requirements of principal campaign committees, as these two issues relate to government ethics. The substance of the Work Group's decisions regarding campaign finance ethics issues can be found in sections 1 and 2 of the bill.

#### Section 1.

This Section amends ORS 260.407 by deleting certain existing allowed uses of campaign contributions. It provides that campaign contributions can "only" be used "for the purpose of making expenditures to support the nomination or election of the candidate." Exceptions are allowed in two circumstances: (a) funds can be distributed to the same candidate's principal campaign committee for a different political office; or (b) funds can be distributed to certain specified entities, including charitable organizations, if a candidate or the principal campaign committee of a candidate does not intend to be a candidate for public office. This section specifically prohibits a number of possible uses of campaign contributions, including personal use, use to defray office expenses, contribution to other candidates, or use to pay civil penalties imposed by government, unless the conduct giving rise to the penalty was non-criminal.

#### Section 2.

ORS 260.037 presently allows candidates to serve as their own campaign treasurer. This Section amends ORS 260.037 to limit a candidate's ability to serve as his or her own treasurer to only two situations: (a) where neither total contributions nor expenditures exceed \$2,000; and (b) where the campaign is funded solely by the candidate. Additionally, it requires that any candidate serving as the candidate's own treasurer appoint and certify a treasurer at the time the candidate designates himself or herself as treasurer in the event the monetary or self-funding limitations are exceeded. Finally, this Section provides that both the candidate and the treasurer have the same duties and are legally responsible for any violations relating to the candidate's principal campaign committee.

## Sections 3-7.

Sections 3-7 of the draft have LC form and style provisions and effective date provisions.

### **B. HB 2598 (Gifts, Honoraria and Financial Gain)**

HB 2598 would make changes to laws concerning gifts, honoraria and financial gain applicable to public officials in Oregon. Sections 1-4 generally deal with the definition and treatment of gifts. Sections 6-11 generally deal with honoraria. Sections 5 and 12-19 have LC form and style provisions, conforming amendments and effective date provisions.

#### Section 1.

This section amends ORS 244.020, the basic definitional section of Chapter 244. The definition of a “gift” (ORS 244.020(5)) is expanded to mean “something of economic value” given not only to a public official or a relative of the public official, but also a member of the public official’s “household.” The definitions of “member of the household” (ORS 244.020(9)) and “relative” (ORS 244.020(14)) are also significantly expanded. This section modifies exclusions in the gift definition by (a) deleting the “entertainment” exclusion (ORS 244.020(5)(b)), (b) adding an exclusion for “event registration expenses,” (c) limiting the exclusion for “food, lodging, travel and event registration expenses” to situations where the public official is a registered attendee at an event or appears on the agenda as a presenter, and (d) providing statutory clarification as to what constitutes “participation.” (See ORS 244.020(5)(b)(C)). The exclusion for food, lodging, travel and event registration expenses applies only to a public official, not relatives or household members.

#### Section 2.

This section amends ORS 244.040 on financial gain. It adds a new restriction on gain received by a household member to the current restriction on gain received by the public official or a relative of the public official. ORS 244.040(1). It clarifies that allowed “gain” includes an official’s compensation package, expense reimbursement, honoraria to the extent allowed by the proposed act (see Section 6 below), gifts that do not exceed specified limits (see Section 3 below), unsolicited awards for professional achievement, certain gifts and items explicitly excluded from the gift definition. ORS 244.040(2).

#### Section 3.

This proposed statutory section provides limitations on the value of any single gift (\$100) from single or multiple sources, and the aggregate value of all the gifts (\$250) in a year from a single source known to have a legislative or administrative interest. The limits apply to both public officials and persons offering gift. Gifts to family and household members are counted against limits on gifts to public officials and candidates for public office.

#### Section 4.

This section makes several technical form and style amendments to ORS 244.100 and incorporates two substantive changes recommended by the Work Group. First, consistent with a public official's reporting requirement found elsewhere in these statutory proposals (see SB 497) it changes the required notice threshold from \$50 to \$75 for persons who provide food, lodging, travel or event registration expenses to a public official.<sup>75</sup> Second, it adds a requirement in Subsection (4) requiring persons providing a public official with an honorarium or other item of value that exceeds the reporting threshold of \$15 in Section 7 to provide notice to that effect to the public official within 10 days.<sup>76</sup>

#### Section 6.

This section prohibits all public officials and candidates for public office from soliciting or receiving honoraria in connection with the official duties of the public official or the office for which the person is a candidate, except for honoraria or other items with a value of \$50 or less. Honoraria received for services performed in relation to a private profession, occupation, avocation or expertise of the public official are permitted.

#### Sections 7.

Section 7 amends ORS 244.060 to change reporting thresholds for food, lodging, travel or event registration expenses, and honorarium. It requires reporting of food, lodging, travel or event registration expenses in an aggregate amount of \$75, and honoraria valued at more than \$15. Section 7 also adds a new subsection to ORS 244.060 requiring reporting of unsolicited awards for professional achievement with a value exceeding \$75.

#### Sections 8.

Section 8 amends ORS 244.280 to delete a superfluous reference involving honoraria and to make conforming changes.

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<sup>75</sup> The reporting threshold currently set out in ORS 244.060 (\$50) is indexed by law. The actual threshold has been adjusted over time and is currently \$144. Indexing is deleted in the Law Commission proposal.

<sup>76</sup> ORS Section 244.100 is one of several statutory provisions amended by more than one of the legislative proposals discussed in this report. The most significant and comprehensive changes will be found in SB 497, which deals most directly and extensively with reporting requirements. See that discussion below under the analysis of SB 497. It is important to recognize that the several statutory drafts are not internally consistent. Statutory changes developed during the consideration of a particular substantive or procedural topic, were dealt with independently from the consideration of other topics by the Government Ethics Work Group and its Sub-Work Groups. Inconsistencies between drafts will be reconciled by Legislative Counsel based upon legislative history, including the sequence in which the Work Group considered material. Legislative Counsel will address such conflicts through its conflicts reconciliation process as the Legislative Assembly passes bills.

## Sections 9 – 11.

Sections 9 and 10 amend ORS 351.067 and ORS 353.270 dealing, respectively, with honoraria received by public officials in the Oregon University System and Oregon Health and Sciences University. Those statutes treat compensation from consulting, appearances, speeches and similar activities, if authorized by the educational entity, as part of the individual's official compensation. These sections conform existing exceptions for educational institutions to the financial gain provisions set forth in Section 2 of HB 2598. Section 11 amends ORS 244.010(1) to avoid an inconsistency between a general mandate for all public officials to "adhere" to the code of ethics in ORS 244.040 and the higher education exceptions by clarifying that officials are to comply with the "applicable" provisions of this chapter.

### **C. SB 494 (Conflicts of Interest)**

SB 494 would make changes to conflicts of interest law applicable to public officials in Oregon. The changes focus on making conflict of interest rules apply equally to all public officials, regardless of position, unless such equal application would or would likely violate state or federal constitutional law.

#### Section 1.

This section amends ORS 244.120. It continues the existing requirement that all public officials disclose "potential" and "actual conflicts," but also contains a number of significant changes to the way in which public officials are to conduct themselves in conflict situations.

- Judges are to be removed from a case when there is either a "potential" or an "actual" conflict of interest. However, judges are to comply with the Code of Judicial Conduct if it provides different requirements.
- After disclosure, all elected public officials (other than judges) and appointed members of boards and commissions are allowed to act freely in situations involving potential conflicts.
- After disclosure, all elected public officials (except judges and members of the Legislative Assembly) and appointed members of boards and commissions with an actual conflict must refrain from participating in any discussion, debate or vote on the matter at hand unless the public official's vote is necessary to meet a requirement of a minimum number of votes to take official action.
- In situations involving actual conflict, members of the Legislative Assembly may not participate in committee or floor discussion, or in caucus meetings, but may, if allowed by legislative rules, vote on the matter when it is considered by the full Senate or House of Representatives.

Section 1 also defines in greater detail what is required for a public official's vote to be "necessary" (See subsection 4) and provides that after disclosure a public official may participate fully in any action or decision where the conflict arises because of

membership in or membership on the board of directors of certain nonprofit corporations (See subsection 6).

## Section 2

This section contains additional amendments to ORS 244.020, the basic definition section of Chapter 244, primarily to incorporate changes to the definition of “business” (subsection 2) and “business with which the public official is associated” (subsection 3) required by the Work Group’s decision to include non-profit entities within the scope of the kinds of interests which create “actual” or “potential” conflicts. Those relationships had previously been excluded from the definition of “business” and “business with which the public official is associated,” keeping them effectively outside of the scope of regulated conflicts. This section also contains other statutory changes approved by the Work Group substantially expanding the definition of “relative” at subsection 16 (including, among others, domestic partners, stepchildren, spouses of children) and “member of household” at Subsection 12 (See also HB 2598 for additional changes to the definition of “relative” and “member of household”). Subsection 17 is amended to provide an exception to “potential conflicts of interest” for ownership of individual stocks in a mutual fund.

## Section 3.

This section amends ORS 244.040, the basic financial gain statute, primarily by expanding the list of permitted kinds of financial gain to include a recommendation made by a public official with regard to the official’s own salary, or salary of a relative or household member when made as part of the official duties or responsibilities of the public official.

## Sections 4.

Section 4 contains changes to statutory provisions of ORS Chapter 293 affecting the Oregon Investment Council to conform to the definitions of “business” and “business with which the public official is associated” found in Section 2 of the proposal.

## Sections 5.

Section 5 amends ORS 469.810 in order to retain the existing, narrow definitions of “relative” and “member of the household” for the Pacific Northwest Electric Power and Conservation Planning Council. This latter proposal to effectively retain a special, limited definition of key terms affecting the scope of conflicts law applicable to one entity reflects a drafting decision that may merit additional consideration.<sup>77</sup>

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<sup>77</sup> The Oregon Law Commission and the Government Ethics Work Group generally endorsed the view that those provisions of other statutory chapters that provide special exceptions to general ethics rules proposed for Chapter 244 or speak specifically to ethics provisions found in Chapter 244 should not be changed to conform to the proposals being recommended to the Legislative Assembly. The rationale for this decision was that each of the identified provisions was very narrow in scope and generally reflected a recognized

## Section 6.

This section repeals ORS 244.135, which presently provides a unique statutory scheme to deal with conflict issues involving members of local planning commissions. Instead, planning commission members are subject to the same requirements as all other members of appointed boards and commissions. Elimination of this special provision is consistent with the Law Commission's decision that conflict laws should apply as equally as possible to all public officials.

## Section 7.

Section 7 contains effective date provisions.

### **D. SB 498 (Individualized Personal Bias)**

SB 498 adds provisions to ORS Chapter 244 requiring disclosure and prohibiting action by public officials in circumstances where choice of action may be significantly influenced by a personal financial interest or an individualized personal bias for or against an identified person.

## Section 2.

This section requires a public official who recognizes that the official's choice of action may be significantly influenced by financial interests or individualized personal bias for or against an identified person to (a) disclose the potential violation and (b) refrain from taking action except as specifically allowed. The section does not apply to judges. It contains differential conduct standards for three groups: (a) members of the Legislative Assembly, (b) other elected public officials and appointed public officials serving on a board or commission, and (c) all other public officials.

## Section 3.

This section allows a public body to adopt rules to administer the provisions of Section 2 above, including exceptions necessary to accommodate the duties of public officials serving the public body. Rules adopted under this section are subject to review and approval by the Government Standards and Practices Commission.

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historical exception. Based on this directive, Legislative Counsel amended ORS 469.810 (see Section 5 above) to delete the connection by reference to ORS 244.020 and add language that would retain the existing, narrow definitions of "relative" and "member of the household" for the Pacific Northwest Electric Power and Conservation Planning Council. Whether this special definitional treatment of one governmental entity is appropriate is a policy decision. The decision reflected in the statutory draft is a logical way, but not the only way in which the directive could be implemented. The question is whether the directive to increase uniformity in statutory application takes precedence over the directive to leave those statutory ethics rules found elsewhere in the Oregon Revised Statutes unchanged at this point.

#### Section 4.

This section establishes a procedure for the executive director of a public body or the governing body of a public body to investigate potential violations. The procedure provides that upon determination that a violation has occurred, the public body may reconsider, set aside or modify any action taken in violation of the Act, disqualify the official from holding any appointment or employment with the public body or report findings to the Government Standards and Practices Commission with a request for the Commission to take action.

#### Sections 5.

This section contains an effective date provision.

#### **E. SB 497 (Public Official Reporting Requirements)**

SB 497 will make changes to the government ethics substantive reporting requirements found in ORS Chapter 244. The provisions focus on who must report, what must be reported, as well as the form and frequency of disclosures. The substance of the Law Commission's decisions regarding reporting requirements can be found in Sections 1-4, 6, 8, 10-12 and 14. Section 19 repeals several statutory provisions as unnecessary or inconsistent with other recommendations regarding elimination of city and county reporting opt outs. Sections 5, 7, 9, 13 and 20 of the draft have conforming provisions, LC form and style provisions and effective date provisions.

#### Section 1.

This section amends ORS 244.050. It retains mandatory reporting through an annual verified statement of economic interest and expands the number of persons who must file a statement by requiring reports from certain previously exempt city and county officials. (See subsection 1(b), (i), (j), (k) and (r)). Subsection 8 allows an amended statement of economic interest to be filed without penalty for 30 days after the filing deadline.

#### Section 2.

This section amends ORS 244.020 by expanding the definition of "member of the household" to include any person residing with the public official, and expands the definition of "relative" by adding domestic partners, any individual for whom the public official has a legal support obligation, siblings, and certain other persons to the list of defined "relatives."<sup>78</sup> (See section 2 (12) and (16) of SB 497).

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<sup>78</sup> ORS Section 244.020 is one of several statutory provisions amended by more than one of the LC drafts discussed in this report. Other significant changes to the definitions of relative will be found in HB 2598. It is important to recognize that the several statutory drafts are not internally consistent. Statutory changes developed during the consideration of a particular substantive or procedural topic, were dealt with independently from the consideration of other topics by the Government Ethics Work Group and its Sub-Work Groups. Inconsistencies between drafts will be reconciled by Legislative Counsel based upon legislative history, including the sequence in which the Work Group considered material. Legislative

### Section 3.

This section amends ORS 244.060 by: (a) requiring addresses and descriptive information for all categories of financial interest reported on a statement of financial interest; (b) adding a requirement to provide disclosure of the five most significant sources of income and deleting existing percentage-based income disclosure requirements; (c) requiring names of household members and relatives age 18 or older not living in the household; and (4) deleting provisions on reporting honoraria, food, lodging and payment of travel expenses (these deleted provisions are moved to a new quarterly report established in Section 6 of the proposed legislation).

### Section 4.

This section amends ORS 244.070 by deleting a requirement to report certain sources of income over \$1,000. That requirement is moved to a new quarterly report established in Section 6 of the proposed legislation. In addition this section includes LC form and style changes.

### Section 6.

This section amends ORS 244.100 by creating a new quarterly report to be filed by mandatory reporters disclosing: (a) gifts and monetary honoraria with a value exceeding \$15; (b) food, lodging and travel expenses with an aggregate value exceeding \$75; and (c) sources of income exceeding an aggregate amount of \$1,000 received from sources doing business with or that have a legislative or administrative interest in the governmental agency served by the public official. Additionally, this section (a) requires gift givers to report the value of gifts exceeding \$15 to both the GSPC and the recipient; (b) changes the existing threshold for providing notice of food, lodging and travel from \$50 to \$75; and (c) requires public officials who do not receive the required notice of gift value from the giver to nonetheless include a good faith estimate of the value of the gift in the quarterly report.<sup>79</sup>

### Section 8.

This section sets forth the specific calendar schedule for filing the quarterly reports required by Section 6.

### Section 10.

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Counsel will address such conflicts through its conflicts reconciliation process as the Legislative Assembly passes bills.

<sup>79</sup> ORS Section 244.100 is another statutory provision amended by more than one of the LC drafts discussed in this report. Other significant changes to the reporting requirements in ORS 244.100 will be found in HB 2598 (see particularly Subsection 4 of HB 2598). Legislative Counsel will address conflicts through its conflicts reconciliation process as the Legislative Assembly passes bills.

This section amends ORS 244.195 by requiring all public bodies to provide information prepared by the GSPC about reporting requirements to every newly elected or appointed public official serving that public body who is required to file statements of economic interest.<sup>80</sup> The section also contains conforming provisions.

#### Sections 11, 12 and 14.

These changes are technical and do not alter existing law. Sections 11 and 12 move the requirement officials in the office of the State Treasurer to file trading statements from ORS 244.055(5) (Section 11) to ORS 244.110 (Section 12). The penalty provision of ORS 244.055 is moved to a separate section (Section 14).

#### Section 15.

This section makes LC form and style changes, but otherwise retains existing reporting requirements for members of Congress or candidates for congressional office.

#### Section 16.

This section contains LC form and style changes, but otherwise retains existing discretionary authority for the Government Standards and Practices Commission to establish criteria for having notices of conflicts of interest provided to the Commission.

#### Section 17.

This section amends ORS 244.290 by adding procedural requirements for the GSPC to accept and file information provided to it and to make statements and other information filed with the Commission available for inspection and copying. These changes parallel provisions already found in ORS Chapter 171 on lobbying reports.

#### Section 18.

This section amends ORS 244.300 by clarifying that all information submitted to the Oregon Government Standards and Practices Commission in any required statement is a public record. Subsection 2 is intended, in part, to preserve the existing confidentiality of trading statements submitted by officials in the office of the State Treasurer under ORS 244.055. Trading statements would remain confidential unless those reports are submitted to the Commission.

### **F. SB 495 (Nepotism)**

SB 495 would add new provisions to the government ethics statutes regarding nepotism. The substantive provisions dealing with nepotism are found in Sections 2 to 4.

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<sup>80</sup> The current requirement applies only to city and county officials.

## Section 2.

This section provides specific expanded definitions for the terms “member of the household” and “relative” applicable to Sections 3 and 4 that follow.

## Section 3.

This section requires an official to comply with conflict of interest provisions in ORS Ch. 244 when appointing, employing, promoting, discharging, firing or demoting a relative or household member. Specific exceptions to this requirement are provided for members of the Legislative Assembly and for most appointments to a position as an unpaid volunteer. It also allows unpaid volunteers to receive reimbursement of expenses provided in the ordinary course of business. Finally, the section clarifies that a public body may make employment decisions in circumstances where a public official might be prohibited from doing so on the basis of nepotism restrictions. That is, relatives may work for the same public body, but relatives cannot generally be involved in the hiring decision of a relative.

## Section 4.

This section contains provisions prohibiting public officials from supervising a relative or household member. It contains specific exceptions parallel to those in Section 3 above, including exceptions for supervision of a relative or household member by a member of the Legislative Assembly or where the relative or household member is an unpaid volunteer.

## Sections 1, 5 and 6.

Sections 1, 5 and 6 have LC form and style provisions and effective date provisions.

## **G. HB 2594 (Subsequent Employment)**

HB 2594 would make changes to ethics law dealing with offers of employment to and subsequent employment by certain public officials. Sections 2-5 contain the substantive provisions dealing with employment. Sections 1, 6 and 7 contain form and style as well as conforming provisions. Sections 8-10 contain effective date provisions.

## Section 2.

This new section contains existing prohibitions on promises of future employment. Those provisions, currently found in ORS 244.040(3), are reorganized but remain substantially unchanged. See Sections 2(1)(a) and Section 2(2). The section also includes an additional objective participation-based restriction on promises of future employment. This latter provision is narrowly drawn to cover only offers from persons involved in any matter in which the public official is also “personally and substantially” participating.”

### Section 3.

This section contains an existing provision (moved from ORS 244.040(6) by Section 5 below). That provision prohibits representing a client for a fee before the governing body of a public body of which the public official is currently a member. It also contains a new provision further prohibiting a current public official from providing any advice or other service for a fee related to influencing action by the public body served by the public official. This would prohibit consulting fees for current public officials. Most significantly Subsection 4 contains a “revolving door provision” prohibiting a former member of the Legislative Assembly from receiving money or other consideration for lobbying until the adjournment of the next regular session following the date the person ceases to be a member of the Legislative Assembly.

### Section 4.

This section contains a two-year restriction on a public official having a direct beneficial financial interest in a public contract authorized by the public official or governing body of which the public official was a member. Present law only prohibits such conduct as a conflict if the public official knows that there will be a benefit. This creates an objective test.

### Section 5.

This section amends ORS 244.040 to delete provisions moved to Sections 2 and 3 of HB 2594. The section also contains a new restriction on use of confidential information by former public officials. Restrictions on use of confidential information by a current or former public official are expanded to prohibit gain to any person, not just the public official.

## **H. SB 496 (Lobbying Reporting Requirements)**

SB 496 would make changes to ethics laws dealing with registration and reporting requirements for lobbyists and those who employ lobbyists. Sections 1 through 9 and 11 contain the substantive provisions dealing with lobbying. Section 10 contains LC form and style provisions. Section 12 contains effective date provisions.

### Sections 1 and 2.

Section 1 amends ORS 171.725 by adding the phrase “executive officials or other persons” to the definition of lobbying to clarify that lobbying includes efforts to influence the executive branch on legislative matters. Section 2 amends ORS 171.730 to clarify that lobbying includes efforts to influence the executive branch on legislative matters.

### Section 3.

This section amends ORS 171.735 to clarify that hour and spending thresholds for lobbyist registration are aggregate thresholds, not separate for each client. Subsection 5 of ORS 171.735 is amended to take account of new titles for certain currently exempt officials and to add several additional positions to the list of public officials exempt from registration and reporting requirements.

### Section 4.

This section amends ORS 171.740 at subsection 3 by adding a new requirement clarifying that a lobbyist must file a separate lobbyist registration for each person that employs the lobbyist. This subsection also tightens the time within which a registration must be filed to not later than three business days after the day the lobbyist “first appears” or “works” for the person. New subsection 4 to ORS 171.740 provides an exception allowing an already registered lobbyist to lobby without compensation on behalf of a person without filing an additional registration statement if no more than 24 hours of time and no more than \$100 is expended on behalf of that person per calendar quarter.

### Section 5.

This section amends ORS 171.745 by: (a) deleting current requirements to report total expenditures on printing, postage, telephone, advertising, public relations, education and research, and miscellaneous items; (b) changing the threshold for itemized reporting of expenditures from \$25 to \$75; (c) adding a new requirement that gifts exceeding \$15 in value are to be reported on an itemized basis; (d) providing a reporting exception to match the registration exception previously added to ORS 171.740 (see Section 4) for uncompensated lobbying, subject to thresholds; and (3) requiring registered lobbyists to file reports on a quarterly basis according to the schedule set forth in Section 11 below.

### Section 6.

This section amends ORS 171.750 to require persons who employ lobbyists to report: (a) the name of each registered lobbyist or lobbying entity; (b) the total amount of money paid to each lobbyist or lobbying entity; (c) the aggregate amount spent on lobbying; (d) all expenditures on behalf of a public official in excess of \$75 on an itemized basis; and (e) all gifts to public officials exceeding \$15 in value on an itemized basis. It further amends ORS 171.750 to require those who employ lobbyists to file reports on a quarterly basis according to the schedule set forth in Section 11 below.

### Section 7.

This section amends ORS 171.722 to require the Government Standards and Practices Commission to use the rule-making process to prescribe forms for lobbying registration and reports.

## Section 8.

This section amends ORS 171.778 by rewriting major portions of the existing statutory section. The intended purpose of these proposed revisions is to substantially parallel the investigation and review process proposed in HB 2595 with regard to ethics complaints under ORS Chapter 244.

## Section 9.

This section amends ORS 171.992 to increase the maximum fine for violations of lobbying regulations from \$1,000 to \$5,000, and provides specific daily penalties for late filing up to the maximum total penalty of \$5000. In addition, this section requires the Government Standards and Practices Commission to report lobbying violations for which a penalty is imposed to the Legislative Assembly.

## Section 11.

This section sets forth the quarterly calendar deadlines for filing lobbying reports.

### **I. HB 2595 (Organization Structure, Rulemaking and Advisory Opinions; Sanctions; Funding; and Remedies)**

Sections 1-16 make changes to ethics laws dealing with the organizational structure of the GSPC, as well as its use of rulemaking and advisory opinions. Sections 1-6, 8-9, 11-12, and 14-16 contain substantive provisions dealing primarily with organization structure, rulemaking and advisory opinions.<sup>81</sup> Sections 17-25 make changes to ethics laws dealing with sanctions. Sections 17-18, 21-23, and 25 contain the substantive provisions dealing with sanctions. Sections 26-28 make changes to ethics laws dealing with funding for the Government Standards and Practices Commission. Sections 29-30 make changes to ethics laws dealing with remedies (status of official action).

Sections 7, 10, 13, 19-20 and 24 contain LC form and style provisions and conforming changes called for by other sections of this legislative proposal. Sections 31 and 32 contain additional conforming changes. Sections 34-39 contain effective date provisions. Section 40 contains an emergency clause provision, making the Act effective with the beginning of the 2007-2009 biennium. July 1, 2007.

## Organization Structure, Rulemaking and Advisory Opinions

### Section 1.

This section amends ORS 244.250 to change the maximum term of office for a GSPC member and making LC form and style changes.

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<sup>81</sup> However, Sections 2 and 11 also deal in part with issues addressed when the Work Group considered sanctions.

## Section 2.

This section amends ORS 244.390 by adding a requirement to consider the public interest and any other penalty or sanction that has been or may be imposed against a public official before deciding to undertake an investigation or impose penalties under ORS 244.350 and ORS 244.360. This section also amends ORS 244.390 to incorporate provisions currently found in ORS 244.030 (repealed by Section 33 below) and contains LC form and style changes.

## Section 3.

This section amends ORS 244.290 by reorganizing and consolidating provisions dealing with the mandatory and discretionary rulemaking authority of the GSPC. The section adds requirements to (a) review existing rules and consider adopting rules dealing with matters of general interest on an annual basis, (b) adopt guidelines or standards clarifying what constitutes a violation and (c) adopt guidelines for determining sanction amounts. This section also adds a requirement to conduct accuracy audits of a sample of all reports submitted to the GSPC. LC form and style changes are made throughout the section.

## Section 4-5.

These sections establish a procedure by which state agencies or statewide associations of public bodies may adopt ethics rules or policies that, upon approval by the GSPC, provide protection from sanctions for public officials who take action in good faith based upon those rules or policies.

## Section 6.

This section amends ORSD 244.100 by deleting existing authority for the GSPC to exempt certain gifts from gift limitations. Additionally, GSPC authority to require gift reporting and disclosure by rule is moved from this section to Section 3 (amending ORS 244.290) above.

## Section 8.

This section amends ORS 244.020, the basic definitional section of ORS Chapter 244 by removing discretionary authority of the GSPC to establish class sizes by rule for purposes of conflicts of interest. The provision is moved to Section 3 above (ORS 244.290).

## Section 9.

This section amends ORS 244.130 by deleting a rulemaking provision and making LC form and style changes. The rulemaking provision is moved to Section 3 above (ORS 244.290).

### Section 11.

This section amends ORS 244.270 by adding a provision that the Government Standards and Practices Commission shall notify the public body served by a public official of any finding by the Commission that a public official has violated ethics law within 10 business days of making its determination. The section also contains LC form and style changes.

### Section 12.

This section amends ORS 244.080 by replacing most of the existing text with new provisions outlining revised procedures for issuing written commission advisory opinions and specifying the reliance effect of such opinions.

### Section 14-16.

Section 14 contains new procedures for issuing written staff advisory opinions and specifying the reliance effect of such provisions. Section 15 permits staff to issue other written or oral advice and specifies the reliance effect of such staff advice. It specifically provides that any written advice not designated a “staff advisory opinion” under section 14 above is considered staff advice issued under this section 15. Section 16 clarifies that the executive director may issue staff advisory opinions, but not commission advisory opinions.

### **Sanctions**

### Section 17.

This section amends ORS 244.050 by deleting certain provisions moved to ORS 244.350 (see Section 2) and contains LC form and style changes.

### Section 18.

This section amends ORS 244.350 to (a) incorporate certain provisions moved from ORS 244.050 (see Section 1 above), (b) increase maximum civil penalties for violating provisions of ORS Chapter 244 from \$1,000 to \$5,000, (c) provide for daily maximum penalties for late filing of statements up to the maximum penalty of \$5,000 and (d) permit the Government Standards and Practices Commission to issue a written reprimand in lieu of a civil penalty. In addition, it contains LC form and style changes throughout.

### Section 21.

This section amends ORS 293.708 by adding a clarifying provision that complaints about violations of this section (which deals specifically with members of the Oregon Investment Council) may be made to the Government Standard and Practices Commission for review, investigation, and possible imposition of civil penalties.

## Section 22.

This section amends ORS 162.005 by making a conforming change to the term “public servant” to clarify that a public servant is a “public official” as defined in ORS Chapter 244.020.

## Section 23.

This section amends the current “opt out” provision in ORS 244.060 to establish a three-step process: GSPC proceedings initially will proceed as regular contested case matters, if the public official involved chooses, the proceeding will be moved to Marion County Circuit Court; but if the GSPC delegates final order authority to the OAH ALJ, then the GSPC can cause the matter to be conducted as an administrative proceeding.

## Section 25.

This section amends ORS 244.400 to make conforming changes required by amendments to the current “opt out” provision of ORS 244.060. The section also contains LC form and style changes.

## **Funding**

### Section 26.

This section appropriates to the Government Standards and Practices Commission a sum to be specified by the Legislative Assembly for the biennium beginning July 1, 2007. The Oregon Law Commission anticipates this sum will be determined through the Ways and Means process after it is determined what the duties of the agency, the GSPC, will be.

### Section 27.

This section contains provisions (a) requiring Oregon Department of Administrative Services to determine the amount of money needed to fund current service levels for each biennium thereafter; and (b) appropriating that amount to the Oregon Government Standards and Practices Commission from the General Fund, subject to allotment under ORS 291.230 to 291.260.

### Section 28.

This section contains an effective date provision for initial determination of current services funding amount by the Oregon Department of Administrative Services.

## **Remedies (Status of Official Action)**

### Sections 29 and 30.

Section 29 adds Section 30 to ORS Chapter 244. Section 30(1) specifies those circumstances under which action taken by a legally disqualified public official is valid. Section 35(2) provides that subsection (1) does not affect (a) the validity or invalidity of an official action under any other provision of law or equity, (b) the rights or remedies otherwise available to any person or (c) any applicable period of limitation or procedural prerequisite for a judicial remedy.

### Section 33.

This section repeals ORS 244.030 and ORS 244.080. The provisions of ORS 244.030 are added to Section 2 above (amending ORS 244.390). The substance of ORS 244.080 is moved to Section 3 (amending ORS 244.290).

## **J. HB 2596 (Adjudication Processes/Training and Legal Expense Trust Fund)**

HB 2596 would make changes to ethics laws dealing with adjudication procedures and educational responsibilities of the GSPC. It would also add new provisions to Oregon's government ethics laws dealing with creation of a legal expense trust fund for the purpose of defraying certain legal expenses of a public official. Sections 1-8 and 23 contain the substantive provisions on adjudication procedures and training as well as a penalty provision dealing with failure to file required reports for a legal expense trust fund (see Section 2). Sections 10-21 contain the substantive provisions dealing with creation and operation of a legal expense trust fund. Sections 9, 22 and 26 contain LC form and style changes. Sections 24 and 25 contain effective date provisions.

### Adjudication Procedures and Training

#### Section 1.

This section substantially amends ORS 244.260 by reorganizing and rewording provisions to make the adjudication process statute easier to read and follow. Provisions are reorganized in sequential order of the adjudication process, starting from the complaint or the Commission's own motion, through the contested case process. Some process provisions have been added from agency administrative rules so that the full process is reflected in statute. This section also includes substantive changes to (a) amend the "opt out" provision that currently allows a party charged with an ethics violation to have the matter taken to circuit court instead of following the administrative hearing process of ORS Chapter 183; (b) extend the time periods to complete the Preliminary Review and Investigatory Phase to 135 and 180 days, respectively; and (c) permit a delay in the 135-day Preliminary Review Phase, if requested by a candidate for public office, when a complaint is filed against the candidate within 61 days of an election. In addition, LC form and style changes are made throughout the section.

### Sections 2 and 3.

These sections amend ORS 244.350 and ORS 244.400, respectively, to make conforming changes required by the changes to ORS 244.260 set forth in Section 1 above. Sections 2 and 3 also contain LC form and style changes.

### Section 4.

This section amends ORS 244.320 in order to consolidate provisions found elsewhere in ORS Chapter 244 regarding a manual on government ethics. Some provisions are moved from ORS 244.290 (See Section 5 below) and ORS 244.330 (See Section 23 below). This section also adds a requirement that the manual set forth recommended uniform reporting methods for use by persons filing statements under Chapter 244.

### Section 5.

This section amends ORS 244.290 by deleting a provision moved to ORS 244.320 (See Section 4 above).

### Section 6.

This section amends ORS 244.340 by deleting a requirement to provide a program of continuing education for lobbyists. It retains the requirement to provide such a program for public officials.

### Section 7.

This section amends ORS 244.160 by adding a subsection clarifying that it is a violation of this chapter for a public official in a political subdivision other than a city or county to fail to file a statement of economic interest with the GSPC if the political subdivision has adopted a resolution requiring such filing. The section also includes LC form and style changes.

### Section 8.

This section amends ORS 244.380 to further clarify that penalties provided in ORS 244.380 for failure to timely file statements of economic interest also apply to statements required by resolution adopted under ORS 244.160 (see Section 7 above).

## Legal Expense Trust Fund

### Section 10.

This section authorizes a public official to establish a legal expense trust fund subject to authorization of the Government Standards and Practices Commission. It allows proceeds of the trust to be used to pay legal expenses incurred by the official in defending against a civil or criminal proceeding brought by a public body arising from the status of the person as a public official.

### Section 11.

This section identifies the allowable uses for proceeds of a legal expense trust fund, including defraying legal expenses and costs reasonably incurred in administering the trust fund.

### Section 12.

This section sets out the process to be used by a public official to establish a legal expense trust fund, including mandatory provisions of the trust agreement and affidavit requirements for the public official and the trustee. This section also establishes the obligations of the Oregon Government Standards and Practices Commission to review the trust agreement and required quarterly reports filed by the trustee.

### Section 13.

This section establishes the responsibilities of the trustee, including receipt of funds, authorization of all expenditures, and filing quarterly statements. It also prohibits relatives, household members, an attorney for the public official, or anyone who has a business or employment relationship with the public official from serving as trustee.

### Section 14.

This section prohibits a principal campaign committee from contributing to a legal expense trust fund, but allows all other persons to make contributions in unlimited amounts.

### Section 15.

This section requires the trustee of a legal expense trust fund (a) to establish a single exclusive account in a financial institution and (b) to deposit all contributions and to draw all expenditures from that account. It also prohibits including any public or private moneys other than contributions in the account and requires the trustee to retain account records for at least two years.

#### Section 16.

This section sets out the obligation of a trustee to (a) file a quarterly statement showing contributions and expenditures from the trust fund, (b) provide the name and address of each contributor and the amount of each contribution, and (c) provide the name and address of each payee, as well as the amount and purpose of each expenditure. This section also establishes the schedule by which quarterly reports are to be filed.

#### Section 17.

This section sets forth the means for termination of a legal expense trust fund and requires that a final report listing all contributions and all expenditures be filed not later than 30 days after a trust fund is terminated.

#### Section 18.

This section establishes a mechanism and priority for return of any moneys remaining in the fund upon termination. Funds are to be returned to contributors on a pro rata basis. In the event attorney fees, costs or any other money judgment are awarded to the public official, the section sets out the distribution order for such funds.

#### Section 19 and 20.

Section 19 amends the “gift” definition in ORS 244.020 to exclude contributions made to a legal expense trust fund and makes other LC form and style changes. Section 20 amends the restrictions on financial gain in ORS 244.040 by adding an exception allowing contributions made to a legal expense trust fund. LC form and style changes are made throughout both sections.

#### Section 21.

This section contains a conforming change to ORS 244.060.

#### Section 23.

This section repeals ORS 244.330. The provisions of ORS 244.330 are moved to ORS 244.320 (See Section 4 above).

### **V. NON-STATUTORY RECOMMENDATIONS**

The Oregon Law Commission determined that a number of important issues were not appropriate for inclusion in proposed legislation, but should be brought to the attention of the Legislative Assembly, the Government Standards and Practices Commission, and the office of the Secretary of State as further recommendations. The Law Commission directed that each of the following matters be submitted to the appropriate body as

additional recommendations of the Oregon Law Commission to supplement the statutory ethics reform package.

A. Recommendations to the Oregon Legislative Assembly:

1. The Assembly should adopt rules for each chamber regarding actual conflicts of members. (SB 494, Section 1)
2. The Assembly should adopt rules regarding members' hiring of relatives to ensure accountability and ensure public trust. (SB 495)
3. The Legislative Assembly should increase its own budget to provide adequate funds for legislators' reasonable office expenses (including staff, computers, paper, copying, travel, etc.) once in office. (HB 2597)
4. The Legislative Assembly should fund a full-time GSPC trainer to better reflect the two primary functions of the GPSC: enforcement and education. (HB 2596)
5. The Legislative Assembly should provide adequate stable funding for the GSPC. (HB 2595)
6. The Legislative Assembly should adopt rules for addressing reports received from the GSPC regarding lobbyists/lobbying entities that have committed ethics violations. (SB 496, Section 9(4))
7. The Legislative Assembly should adopt rules for each chamber regarding limits on gifts from persons with legislative or administrative interests. (HB 2598)

B. Recommendations to the Oregon Government Standards and Practices Commission:

1. The GSPC should maximize the availability of training tools to all public officials. (HB 2596)
2. The GSPC should more prominently label its *Guide for Public Officials* as an advisory opinion and distribute the *Guide* more readily to public officials. (HB 2595)

C. Recommendations to the Oregon Secretary of State:

1. The Secretary of State should provide clear notice to political campaign committee treasurers and candidates of their statutory responsibilities and liabilities regarding reporting and use of campaign funds. (HB 2597)

2. The Secretary of State should make sure candidates' names and the respective offices they seek are clearly provided in principal campaign committee records so they can be easily searched online and tracked by the public. (HB 2597)

## **VI. CONCLUSION**

As James Madison said over 200 years ago, “[I]f men were angels, no government would be necessary.” Laws alone cannot overcome human frailty. In the final analysis, ethical conduct depends upon ethical principles being internalized into the values and consciousness of public officials and the public they serve. Ethics laws establish minimum standards for conduct and provide mechanisms for enforcing those standards. Such laws can be a useful adjunct to ensure ethical behavior in public office.

The basic principles of ethics in government are clear: Public office is a public trust. Public office should not be used for private gain and public officials should act fairly and impartially with regard to all members of society. While those basic ideas can already be found in Oregon law, there appears to be widespread agreement that Oregon’s government ethics laws are in need of revision to enhance clarity, consistency, and conformity with those underlying principles. The recommendations contained in this report and the accompanying draft statutes are intended to achieve those goals.

Some of the recommendations and proposed statutory provisions are undoubtedly controversial and involve significant public policy choices. It is reasonable to inquire whether the proposals have gone too far or not far enough in reforming Oregon’s government ethics laws. That debate, as it continues before the Legislative Assembly, must be informed by those basic underlying ethical principles identified at the beginning of this report: public office as a public trust for the benefit of the public rather than the benefit of public officials and impartiality in the treatment of everyone. Full consideration of those principles will place decision makers in the best position to evaluate whether the proposed legislation should ultimately become a part of Oregon law.