The *Conflict of Interest Act*: Five-Year Review

Submission to the Standing Committee on Access to Information, Privacy and Ethics

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THE CONFLICT OF INTEREST ACT: FIVE-YEAR REVIEW
SUBMISSION TO THE STANDING COMMITTEE ON ACCESS TO INFORMATION, PRIVACY AND ETHICS

EXECUTIVE SUMMARY

This submission includes recommendations for amendments to the *Conflict of Interest Act* (Act). Some are quite broad in scope, some target specific provisions of the Act, and others are largely technical in nature. I believe that these recommendations, if adopted, would increase the Act's effectiveness by making it clearer and more consistent, easier to administer and enforce, and more reflective of the Act's objectives.

The format of the submission mirrors the structure of the Act, with chapters on definitional issues, rules of conduct, compliance measures, post-employment, and administration and enforcement.

My recommendations collectively address broader thematic areas that are of particular concern to me, and that I consider to be priorities. These include:

- increasing transparency around gifts and other advantages;
- strengthening the Act's post-employment provisions;
- narrowing the overly broad prohibition on engaging in outside activities;
- narrowing the overly broad prohibition on holding controlled assets;
- introducing some disclosure and reporting obligations for non-reporting public office holders;
- addressing misinformation relating to investigative work;
- adding administrative monetary penalties for breaches of the Act's substantive provisions; and
- harmonizing the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons* (Members' Code).

GIFTS AND OTHER ADVANTAGES

The Act's rules governing the acceptance and disclosure of gifts and other advantages have contributed to a misconception that a gift's value determines its acceptability. In fact, an acceptability test applies to all gifts and other advantages that may be offered. Public office holders are prohibited from accepting any gifts or other advantages that may reasonably be seen to have been given to influence them. Their value is simply a threshold for public declaration by reporting public office holders: acceptable gifts worth $200 or more must be disclosed to my Office and publicly declared.

To make the acceptance of gifts and other advantages more transparent, I recommend lowering the $200 threshold for public disclosure to a minimal amount, such as $30

(Recommendation 4-8), and requiring that all gifts that are accepted and that relate to a public office holder's position be disclosed to the Commissioner and publicly declared (Recommendation 4-27).

POST-EMPLOYMENT

While I believe that the Act's post-employment rules are appropriate, I am concerned that a lack of reporting obligations makes them difficult to enforce.

My recommendations in this area include requiring former reporting public office holders to report to the Commissioner any firm offers of employment received during their one- or two-year cooling-off period, including offers relating to service contracts, appointments to boards of directors and partnerships (Recommendation 5-6), and to report on their duties and responsibilities in relation to their new employment (Recommendation 5-7). I further recommend that former reporting public office holders be prohibited not only from accepting work with an entity with which they had direct, significant and official dealings during their last year in office, as is currently the case, but also from working for an entity *in relation to* which they had such dealings during their last year in office (Recommendation 5-1).

OUTSIDE ACTIVITIES

With limited exceptions, the Act prohibits reporting public office holders from engaging in a range of outside activities. I believe that the Commissioner should have discretion to permit these activities in cases where restricting them may cause unnecessary hardship if they are not incompatible with a reporting public office holder's official duties. I recommend amending the Act to give the Commissioner the authority to permit outside activities where they are not incompatible with a reporting public office holder's duties (Recommendation 3-8). I also recommend an amendment to require public reporting of any exceptions to the prohibition that are granted (Recommendation 4-12).

CONTROLLED ASSETS

I believe that the Act's prohibition on reporting public office holders holding controlled assets is also too broad. I recommend narrowing the definition of controlled assets (Recommendation 4-3) and limiting the absolute prohibition to those who have a significant amount of decision-making power or access to privileged information, such as ministers, ministers of state, parliamentary secretaries, chiefs of staff and deputy ministers. The prohibition would apply to other reporting public office holders only if holding the controlled assets would place them in a conflict of interest (Recommendation 3-11).

A related recommendation would also limit the requirement to divest controlled assets to those reporting public office holders who have a significant amount of decision-making power or access to privileged information. The controlled assets of all other reporting public office holders would be subject to a conflict of interest test; where a conflict of interest is

identified, these reporting public office holders would be required to sell the controlled assets in an arm's length transaction (Recommendation 4-18).

Non-reporting Public Office Holders

With respect to non-reporting public office holders, I believe that the Act should be amended to establish some disclosure and public reporting requirements for them in relation to outside activities, recusals, and gifts and other advantages (Recommendation 1-1). This overarching recommendation is supported by a suite of recommended amendments to individual provisions of the Act (Recommendations 4-22 to 4-27).

Addressing Misinformation relating to Investigative Work

Senators or Members of the House of Commons sometimes make inaccurate public statements relating to a request for an examination that has been raised in the public domain. I have always refrained from making public comments about an ongoing examination, choosing instead to correct any misinformation once the examination is completed and a report is issued. However, in cases where the Commissioner does not conduct an examination or discontinues an examination without issuing a report, he or she should have an opportunity to correct the public record. I therefore recommend that the Commissioner be given express authority to comment where doing so is in the public interest or serves to clarify the mandate of the Office, especially in order to correct misinformation (Recommendation 6-3).

Administrative Monetary Penalties

In order to more effectively encourage compliance with the Act, I recommend allowing the Commissioner to impose administrative monetary penalties for breaches of the Act's substantive provisions, rather than just for failures to meet certain reporting deadlines as is the case at present. Penalties could be imposed for breaches relating, for example, to the Act's gift rules, prohibited outside activities, holding controlled assets and failures to recuse (Recommendation 6-13), and these would apply to both reporting and non-reporting public office holders.

Harmonizing the Act and the Members' Code

The Act is one of two regimes that I administer. The other is the Members' Code. Although the Act and the Members' Code have similar provisions, there are substantive and procedural differences between the two. Among other issues, those differences have led to a lack of clarity for individuals who are subject to both regimes, namely Members who are ministers or parliamentary secretaries. I recommend that Parliament take steps to harmonize the Act and the Members' Code in order to ensure consistency of language and processes where appropriate (Recommendation 1-2).

Such harmonization is supported by my recommendation to expand the scope of the Act's definition of conflict of interest to cover "entities" as well as "persons (Recommendation 2-3). Other provisions that refer only to "person" or "persons" would also be expanded to include "entity" or "entities". The word "entity" is included in related provisions of the Members' Code.

Another recommendation seeks to harmonize the processes for launching an investigation. Unlike the Members' Code, which provides for a preliminary review stage before an inquiry is launched, the Act does not provide for such a review before an examination is launched. I believe the Act should provide for a preliminary review of a request for an examination so that I can determine whether an examination is warranted before proceeding (Recommendation 6-2).

I note that, despite the number and scope of the recommendations that I have presented for the consideration of the House of Commons Standing Committee on Access to Information, Privacy and Ethics, the *Conflict of Interest Act* is already a useful tool for preventing conflicts between public and private interests.

CHAPTER 1: INTRODUCTION AND GENERAL OBSERVATIONS

INTRODUCTION

The *Conflict of Interest Act* (Act) came into force in July 2007 and was amended once, in December 2011. The Act applies to public office holders, including ministers, parliamentary secretaries, ministerial staff, ministerial advisers, deputy ministers and, with limited exceptions, all other full- and part-time Governor in Council appointees. There are approximately 3,000 public office holders subject to the Act.

The five-year review of the *Conflict of Interest Act* is an important opportunity to explore how well the Act is working and how it could be amended to better meet the purpose for which it was enacted. The Standing Committee on Access to Information, Privacy and Ethics is now undertaking its study of the Act, in order to make any recommendations to the House of Commons.

The role of the Conflict of Interest and Ethics Commissioner is to administer the Act and the *Conflict of Interest Code for Members of the House of Commons* (Members' Code). These two regimes set standards of conduct, mainly relating to conflict of interest, for public officials, whether appointed or elected. Both regimes are subject to a five-year review in 2012, and my experience in administering both the Act and the Members' Code since my appointment as Commissioner five years ago has served to inform this submission.

The mission statement adopted by my Office is: *To administer the conflict of interest rules for Members of the House of Commons and public office holders in order to maintain and enhance the trust and confidence of the Canadian public in the conduct of these elected and appointed officials.* In line with this mission, my Office's main responsibilities are to:

- provide confidential advice to public office holders and Members of the House of Commons on their obligations under the Act and the Members' Code;
- receive and review confidential reports of assets, liabilities, income and activities of reporting public office holders and Members of the House of Commons in order to advise on and establish appropriate compliance measures;
- maintain confidential files of required disclosures;
- maintain public registries of publicly declarable information;
- administer an administrative monetary penalty regime under the Act for failures to comply with certain reporting requirements;
- conduct examinations and inquiries into alleged contraventions of the Act and the Members' Code;
- provide confidential advice to the Prime Minister about conflict of interest and ethics issues; and

- increase awareness of the Act through outreach and education.

As Commissioner, I have sought to ensure that each part of my mandate is administered efficiently and effectively. In particular, I have placed a great deal of importance on the role of advice, education and outreach to prevent conflicts from arising.

I believe that the regime, at its core, is functioning well. The recommendations in this submission seek to increase the Act's effectiveness by making it clearer and more consistent, easier to administer and enforce, and more reflective of the purpose for which it was enacted. I have commented, in past annual reports and examination reports, on challenges I have encountered with the Act in its current form and recommended improvements that could be made where appropriate. Most of these are reflected in this submission along with some additional observations.

This submission is organized with reference to the structure of the Act itself. The chapters that follow cover the purpose clause and definitions, rules of conduct, compliance measures, post-employment rules, and administration and enforcement measures in the Act.

My recommendations collectively address broader thematic areas that are of particular concern, and can be characterized as my priorities:

- increasing transparency around gifts and other advantages;
- strengthening the Act's post-employment provisions;
- narrowing the overly broad prohibition on engaging in outside activities;
- narrowing the overly broad prohibition on holding controlled assets;
- introducing some disclosure and reporting obligations for non-reporting public office holders;
- addressing misinformation relating to investigative work;
- adding administrative monetary penalties for breaches of the Act's substantive provisions; and
- harmonizing the Act and the Members' Code.

Before moving on to the next chapters I will add observations in three broad areas.

GENERAL OBSERVATIONS

Persons subject to the Act

The Act sets out two separate classes of public office holders – reporting public office holders, and all other public office holders, who I will sometimes refer to as non-reporting public office holders. All public office holders are subject to the Act's general provisions. Reporting public office holders have additional obligations with respect to reporting, disclosure and public declaration. Of the approximately 3,000 public office holders, about 1,100 are reporting public office holders. The composition of these two groups is discussed in more detail in the next chapter.

I do not believe that there are sufficient mechanisms to address possible conflict of interest situations in relation to non-reporting public office holders. I instituted the practice of sending an annual letter to all non-reporting public office holders three years ago reminding them of their obligations under the Act and providing them with additional advice on specific provisions. While this may go some way to help ensure that these individuals remain aware of their obligations, they do not have the same level of contact with my Office as reporting public office holders largely because they do not have any disclosure obligations.

I am therefore recommending that some disclosure and public reporting requirements be established for non-reporting public office holders.

Reporting public office holders must provide a confidential disclosure to the Commissioner that includes detailed information about their assets, liabilities and the income they received, and certain outside activities. I do not recommend that all of these obligations extend to non-reporting public office holders.

I do, however, recommend that the disclosure and public reporting of certain outside activities do apply as well to non-reporting public office holders and that they also be required to report any material change to that information. This would help to identify possible conflicts of interest early and allow proactive measures to be taken.

I also recommend that the same requirements for disclosure and public reporting of recusals and gifts or other advantages as apply to reporting public office holders apply as well to non-reporting public office holders.

These recommendations are set out in more detail in Chapter 4 under the heading Recommendations relating to Non-Reporting Public Office Holders (Recommendations 4-22 to 4-27).

RECOMMENDATION 1-1

That the Act be amended to establish certain disclosure and public reporting requirements for non-reporting public office holders in relation to outside activities, recusals and gifts or other advantages. See also Recommendations 4-22 to 4-27.

Partisan behaviour

The House of Commons and the Senate have established rules to govern parliamentary conduct in each House of Parliament. The Speaker determines whether a parliamentarian is adhering to the standards of conduct within the context of proceedings in the Senate or House of Commons.

There is little, however, to govern the partisan behaviour outside of Parliament, either of Members generally or of Members who are also ministers or parliamentary secretaries. The Act and the Members' Code, which focus primarily on conflict of interest between private interest and public duties, do not address partisan behaviour as such. I note that a document issued by the Prime Minister under the title *Accountable Government: A Guide for Ministers and Ministers of State 2011* provides some guidance in this area, but it is limited in scope.

I have noted on several occasions, most recently in my submission to the Standing Committee on Procedure and House Affairs with regard to the five-year review of the Members' Code, that my Office has received a number of complaints that, in some cases, partisan conduct of politicians did not meet the expectations of Canadians. Behaviours such as making misleading statements or attacking a political foe on a personal level weaken the image that citizens have of those who hold elected office, and risk impugning the reputation of the institutions that they serve.

A higher tone of discourse and behaviour in the political arena would be desirable. I understand why citizens may wish to raise these concerns with my Office, and I find them to be legitimate concerns. In my 2010-11 Annual Reports, under both the Act and the Members' Code, I noted that "I face a challenge when the activity itself may be questionable but does not breach the Act or the Code".

In the absence of clear rules governing the ethical aspects of the partisan behaviour of politicians, I have recommended in the context of the five-year review of the *Conflict of Interest Code for Members of the House of Commons* that the House may wish to consider implementing a separate set of rules to address the conduct of Members, including ministers and parliamentary secretaries, and their staff, when engaged in partisan activities outside the House of Commons.

I mention this recommendation here, in the review of the Act, given the overlap for those Members who are also public office holders.

Harmonizing the two regimes

The Act and the Members' Code establish separate conflict of interest regimes that have similar but not identical provisions. The differences are both substantive and procedural. Members who are also ministers or parliamentary secretaries are subject to both regimes. The existence of two very similar but distinct regimes has created some confusion generally and the differences between the two regimes can result in a lack of clarity specifically for those individuals subject to both. I have streamlined my approach to administering these regimes wherever possible, including in the drafting of my annual reports and investigation reports.

In my 2010-11 Annual Reports, both under the Act and the Members' Code, I raised the possibility that the two instruments might be combined into one legislative instrument, which would set out conflict of interest rules for Members of the House of Commons and for public office holders. It would include more stringent rules for ministers and parliamentary secretaries and others who have a significant amount of decision-making powers and access to privileged information. Distinctions could be kept, where appropriate, for different classes of public office holders or for Members. This model has been followed in a number of provinces.

The Standing Committee on Procedure and House Affairs is currently undertaking a review of the Members' Code. This may be an opportune time to explore, at a minimum, ways in which the language and processes set out in the two regimes might be harmonized. I note that there may also be a need to make related amendments to the *Parliament of Canada Act* in order to enable a harmonized approach.

I recommend that Parliament consider ways in which the two regimes might be harmonized.

RECOMMENDATION 1-2

That Parliament take steps to harmonize the Conflict of Interest Act *and the* Conflict of Interest Code for Members of the House of Commons *to provide consistency in their language and processes, where appropriate.*

CHAPTER 2: PURPOSE CLAUSE AND DEFINITIONS

This Chapter addresses the statement of purpose in the *Conflict of Interest Act* (Act), as well as definitions of certain terms that are used in the Act. In some cases, I make recommendations about how sections 2, 3 and 4 might be strengthened. In others, where I do not believe changes are needed, I may make related observations.

PURPOSE CLAUSE

The Act does not contain an overarching statement of the underlying rationale for the Act. Section 3, the purpose clause, includes five paragraphs, each of which sets out specific goals of the Act:

- to establish clear conflict of interest and post-employment rules;
- to minimize the possibility of conflicts between private interests and public duties and provide for the resolution of such conflicts should they arise;
- to establish the Commissioner's mandate;
- to encourage experienced persons to become public office holders; and
- to facilitate interchange between the private and public sector.

Both the precursor of the Act, the *Conflict of Interest and Post-Employment Code for Public Office Holders (2006)*, and the *Conflict of Interest Code for Members of the House of Commons* (Members' Code) include a statement to the effect that their purpose is to enhance public trust in public office holders and confidence in their objectivity and impartiality. In order to highlight the rationale for the Act, I recommend that a similar statement be included in the Act.

RECOMMENDATION 2-1

That paragraph 3(a) of the Act be amended to reflect the overarching objective for the Act along the following lines:

3. The purpose of this Act is to

a) establish clear conflict of interest and post-employment rules for public office holders <u>in order to maintain and enhance public confidence and trust in the integrity of public office holders as well as confidence in the objectivity and impartiality of the decision-making process in the government</u>.

DEFINITIONAL ISSUES

Many of the definitions of terms used in the Act are found in section 2. The definition of "conflict of interest" is found in section 4. In this chapter I highlight the more important definitional issues that have arisen in administering the Act. I consider, as well, whether some of the central terms used in the Act should be defined.

Conflict of interest

"Conflict of interest" is the central concept of the Act.

While section 2 contains a range of definitions, it does not include a definition of "conflict of interest". Section 4 in effect provides that definition. It reads as follows:

> ***4.*** *For the purposes of this Act, a public office holder is in a conflict of interest when he or she exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests.*

The location of section 4, in Part 1, under the heading "Conflict of Interest Rules", has been the source of some confusion. I have received a number of requests to investigate individuals on the basis of an alleged contravention of section 4 alone. There can be no such contravention because section 4 contains no substantive rule of conduct. It simply describes when a public office holder would be in a conflict of interest. Section 4 can only be applied in conjunction with other provisions that set out substantive rules and include the expression "conflict of interest". These include sections 5, 6, 16 and 21 and subsections 25(1) and 27(10).

For this reason, the content of section 4 would be more appropriately placed in section 2, the definition section. I also recommend in Chapter 3 that a new section 4 be added establishing a general prohibition in relation to conflicts of interest.

RECOMMENDATION 2-2

That the Act be amended to add a definition of "conflict of interest" in section 2, the interpretation section of the Act, based on the wording of the current section 4.

I note that the current description of "conflict of interest" includes improperly furthering another person's private interests. I recommend that the description be expanded to include improperly furthering the private interests of entities as well. The term "person" has a specific legal meaning and therefore limits the reach of the sections where the expression

"conflict of interest" is found. Including entities would eliminate a loophole that has become evident in applying the Act.

The use of the term "entity" in the Act would also serve to harmonize the wording of the Act with similar provisions found in the Members' Code.

RECOMMENDATION 2-3

That the definition of "conflict of interest" be expanded to cover "entities" as well as "persons" as follows: "or to improperly further the private interest of another person or entity".

Friend

I have had occasion to interpret the term "friend" in the course of several examinations under the Act and have concluded that it includes individuals who have a close bond of friendship, a feeling of affection or a special kinship with the public office holder concerned and does not include members of a broad social circle, business associates or colleagues unless such a relationship has developed. I do not believe that it is necessary to include a definition of "friend" in the Act.

Real, apparent and potential conflict of interest

Suggestions have been made from time to time that the omission of the terms "real", "apparent" and "potential" in relation to "conflict of interest" constitutes a significant gap in the legislation. I note that a recommendation resulting from the Oliphant Commission was that the definition of "conflict of interest" be amended to mention apparent conflicts of interest expressly. I note as well that the precursor to the Act, the 2006 Code, included these terms in its principles and reflected the concepts in some of its rules.

Although these terms are not expressly used in the Act, the concepts underlying them are reflected implicitly in many of its provisions. Most importantly, the definition of "conflict of interest" itself, found currently in section 4, reflects these concepts: a conflict of interest exists if the exercise of an official power, duty or function "provides an opportunity" to further private interests. Section 4 does not require that a private interest actually be furthered. Section 4 would appear to include both apparent and potential conflicts of interest.

These concepts are carried forward into any provision of the Act that includes the expression "conflict of interest". Furthermore, there are indications in other provisions of the Act that the concepts "apparent" and "potential" are implicitly included.

For example, section 6 prohibits public office holders from making decisions related to the exercise of an official power "if the public office holder knows or reasonably should know

that, in the making of the decision, he or she would be in a conflict of interest". Similarly, section 11 prohibits gifts "that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function". Both of these sections contemplate an apparent conflict of interest.

Section 5 requires a reporting public office holder to "arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest". This wording contemplates a potential conflict of interest.

I do not believe that the terms "apparent" and "potential" need to be added to the definition of the expression "conflict of interest". Nor have I identified any other provision where such an addition would appear to be necessary.

Private interest

The concept of "furthering a private interest" is the central element of the concept of "conflict of interest". In some sections, such as sections 8 and 9, the term conflict of interest is not used but its underlying meaning, built on the concept of furthering a private interest, is incorporated directly into the section.

The Act does not provide a positive definition of the expression "private interest". However, subsection 2(1) does set out certain situations where an interest in a decision or matter is not considered to be a private interest for the purposes of the Act. The provision reads as follows:

> *"private interest" does not include an interest in a decision or matter*
>
> *(a) that is of general application;*
> *(b) that affects a public office holder as one of a broad class of persons; or*
> *(c) that concerns the remuneration or benefits received by virtue of being a public office holder.*

In considering the meaning of "private interest", I have concluded that it does not include political interests such as enhancing a political profile or gaining partisan advantage. I had occasion to examine this question in relation to *The Cheques Report*, issued on April 29, 2010. That report dealt with the use of partisan or personal identifiers in connection with federal funding announcements.

In this regard, I note that Part 2 of the Act sets out specific measures that reporting public office holders must take in order to achieve and maintain compliance with the Act. The interests that must be disclosed are personal in nature, having to do with the individual's assets, liabilities, outside activities, gifts, etc. While the specific interests dealt with in Part 2 of the Act do not need to be taken as an exhaustive list for the purpose of giving meaning to "private interest", they do imply that the term "private interest" refers to personal interests rather than those arising from the public office holder's position or political affiliation.

If it is intended that the Act cover political interests, this should be made explicit. Otherwise, I do not believe that a positive definition of "private interest" is necessary.

Public office holder

The expression "public office holder" is defined in section 2 to include ministers, parliamentary secretaries, ministerial staff, ministerial advisers, Governor in Council appointees (with some important exceptions) and certain ministerial appointees. Ministerial staff and Governor in Council appointees are the largest groups of public office holders.

In the course of administering the Act, my Office has identified a number of difficulties and anomalies with the definition of public office holder. I believe there are some components of the definition that should be adjusted. What follows, in order of appearance in the definition, is a description of the concerns that have arisen, the approaches the Office has taken and, in some cases, suggested changes.

Ministerial staff

Paragraph (*b*) of the definition "public office holder" includes members of ministerial staff. Subsection 2(1) of the Act establishes an independent definition of ministerial staff, set out below:

> *"ministerial staff" means those persons, other than public servants, who work on behalf of a minister of the Crown or a minister of state.*

I have interpreted this definition to include those persons who are working for a minister in his or her role as a minister and are paid out of the ministerial budget, and not to include those who are working in the constituency or parliamentary office of a Member, who also happens to be a minister, or under any other arrangement.

The wording of this provision and, in particular, the language used in the French version ("au sein du cabinet d'un ministre") supports this distinction. While I am not necessarily recommending this, consideration could be given to amending the Act to cover constituency staff and parliamentary staff on the grounds that those staff members could be drawn into ministerial matters.

On its face, the "work" contemplated in the definition "ministerial staff" could include all work, including full-time and part-time work, contract work and volunteer work. My Office is dependent on the ministers' offices to provide information on their ministerial staff. My Office is currently only advised of the individuals employed under section 128 of the *Public Service Employment Act* to assist a minister to exercise his or her ministerial powers, duties and functions. It has seldom been advised of individuals performing contract work or volunteer work on behalf of a minister.

RECOMMENDATION 2-4

That the definition of ministerial staff be amended to make it clear either that the definition covers individuals working on behalf of the minister on contract or as volunteers, or that it is limited to individuals appointed under section 128 of the Public Service Employment Act*.*

Ministerial adviser

Paragraph (*c*) of the definition "public office holder" includes ministerial advisers. It is defined as follows:

> *"ministerial adviser" means a person, other than a public servant, who occupies a position in the office of a minister of the Crown or a minister of state and who provides policy, program or financial advice to that person on issues relating to his or her powers, duties and functions as a minister of the Crown or a minister of state, whether or not the advice is provided on a full-time or part-time basis and whether or not the person is entitled to any remuneration or other compensation for the advice.*

In this connection, I have looked into the question of whether special advisers to a minister, appointed pursuant to section 127.1 of the *Public Service Employment Act*, qualify as "ministerial advisers" within the meaning of the Act. As noted in my 2009-2010 Annual Report, technically these special advisers are generally appointed to a position in a government department and, therefore, they do not "occupy a position" in the office of a minister. As a result, they are not considered to be ministerial advisers despite the fact that they would appear to perform the advisory role contemplated by the Act. It would seem appropriate to apply the Act to any adviser who has consistent access to privileged information in a minister's office.

We have never been informed by any minister's office of the existence of any adviser within the meaning of this definition. It is unclear who is intended to be included under this definition. I suggest that all ministerial advisers, whether or not they occupy a position in a minister's office, should be covered by the conflict of interest rules in the Act and that the Commissioner should be notified of all current ministerial advisers.

RECOMMENDATION 2-5

That the definition of "ministerial adviser" be amended to remove the condition that they occupy a position in the office of a minister and to clarify who is intended to be included as a ministerial adviser.

Governor in Council appointees

Paragraph (*d*) of the definition "public office holder" includes Governor in Council appointees, and then sets out a series of exceptions. That paragraph reads as follows:

> *(d) a Governor in Council appointee, other than the following persons, namely,*
>
> *(i) a lieutenant governor,*
>
> *(ii) officers and staff of the Senate, House of Commons and Library of Parliament,*
>
> *(iii) a person appointed or employed under the* Public Service Employment Act *who is a head of mission within the meaning of subsection 13(1) of the* Department of Foreign Affairs and International Trade Act*,*
>
> *(iv) a judge who receives a salary under the* Judges Act*,*
>
> *(v) a military judge within the meaning of subsection 2(1) of the* National Defence Act*, and*
>
> *(vi) an officer of the Royal Canadian Mounted Police, not including the Commissioner;*

Since the coming into force of the Act in 2007, my Office has encountered situations in which the application of the Act to certain groups of Governor in Council appointees has been unclear or problematic.

Officers of Parliament

There is a need to identify clearly which Governor in Council appointees are to be excluded under subparagraph (*d*)(ii) as officers of the Senate or the House of Commons. Clearly those officers who are part of the apparatus of the Senate or the House of Commons, such as the Clerks, the Deputy Clerks, the Law Clerks, the Usher of the Black Rod and the Sergeant-at-Arms, are covered by this exception. The Senate Ethics Officer and the Conflict of Interest and Ethics Commissioner are both appointed pursuant to the *Parliament of Canada Act* and have both been considered by my Office to be included in this exception as officers of the Senate and the House of Commons respectively.

There is another group of officers, appointed under various other Acts, who are sometimes referred to as officers of Parliament and sometimes as agents of Parliament. The Privy Council Office has traditionally referred to them as agents. This group includes the Auditor General of Canada, the Chief Electoral Officer, the Commissioner of Official Languages, the Information Commissioner, the Privacy Commissioner, the Commissioner of Lobbying and the Public Sector Integrity Commissioner. The precursor codes to the *Conflict of Interest Act* were applied to them. I have therefore continued to apply the Act to them. If it is intended that some or all of them not be covered by the Act, the Act should expressly provide an exception.

RECOMMENDATION 2-6

That the Act be amended to list the agents of Parliament who are intended to be included in or excluded from the application of the Act.

Diplomatic personnel

Subparagraph (*d*)(iii) of the definition "public office holder" excludes public servants appointed under the *Public Service Employment Act* who are also appointed as heads of mission for the Department of Foreign Affairs and International Trade.

There is no other exception for diplomatic personnel. Therefore, honorary consuls, appointed by the Governor in Council on a part-time basis, would appear to be covered by the Act. However, not all honorary consuls are Canadian citizens. Although this may involve extra-territorial application of the Act and may raise enforcement issues, it seems reasonable, nonetheless, to apply the Act to them in light of the fact that they have a representative role in relation to Canada, and I have done so.

Prothonotaries

Judges who receive a salary under the *Judges Act* are excluded from the Act under subparagraph (*d)*(iv) of the definition "public office holder", but that exception is not extended to prothonotaries of the Federal Court, who are also appointed by Governor in Council. Even though the prothonotaries are not remunerated under the *Judges Act*, I believe that they should be excluded from the definition "public office holder" because of the nature of their judicial duties.

In the circumstances, I have determined that it is sufficient for prothonotaries to adhere to the conflict of interest rules applicable to the judges of their court as an appropriate measure under section 29 of the Act by which they are to comply with the Act.

RECOMMENDATION 2-7

That prothonotaries of the Federal Court be excluded from the definition of public office holder and the application of the Act.

Members of offshore petroleum boards

The enabling legislation for the Canada-Newfoundland and Labrador Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board exempts members of these boards from the application of federal guidelines related to conflict of interest. These

individuals are subject to provincial conflict of interest regimes. The reference to "guidelines" has not been amended to refer to the current federal statutory conflict of interest regime.

I have treated this as an obvious oversight and have not applied the Act to the members of these boards. I believe the Act should be amended to exempt them.

RECOMMENDATION 2-8

That the Conflict of Interest Act *expressly exempt from the definition of public office holder and the application of the Act members of the Canada-Newfoundland and Labrador Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board.*

Public servants who require Orders in Council to exercise certain powers

Sometimes, employees of the Public Service of Canada are conferred specific powers by Order in Council to perform special functions that are outside their main responsibilities. These include, for example, official receivers appointed under the *Bankruptcy and Insolvency Act* who normally spend only a small proportion of their time performing the functions assigned to them by Order in Council and therefore remain public servants. I have taken the position that these individuals are public office holders, but not reporting public office holders, where they only spend a small amount of time on these special functions.

I recommend that the Act provide an exception for these public servants. This would be in keeping with the rule for diplomatic personnel who are also public servants. As public servants, they continue to be subject to the *Values and Ethics Code* applicable to all employees of the Public Service of Canada.

RECOMMENDATION 2-9

That the definition of "public office holder" expressly exclude individuals appointed by Governor in Council to perform a designated power on a part-time basis if they remain employees of the Public Service of Canada.

Positions approved by the Governor in Council

Paragraph (*d*) of the definition of "public office holder" provides that all Governor in Council appointees, except those listed, are public office holders. To be covered by the definition, the appointment must actually be made by the Governor in Council. There are a number of individuals, including, for example, some directors of museums and the Governor of the Bank of Canada, whose appointments, as set out in the relevant legislation, only require approval by the Governor in Council. In these instances, the individuals are appointed by their

organization. While the Act does not apply to them, in almost all cases individuals falling into this category have agreed to comply voluntarily with its provisions. Their exclusion appears to have been an oversight and they should be expressly made subject to the Act.

I note that paragraph (*d.1*) of the definition "public office holder" expressly includes "a ministerial appointee whose appointment is approved by the Governor in Council". This could be broadened to include all appointments that require Governor in Council approval.

RECOMMENDATION 2-10

That the definition "public office holder" be broadened to include all individuals whose appointments are approved by the Governor in Council.

Positions designated by minister

Paragraph (*e*) of the definition of "public office holder" includes any full-time ministerial appointee designated by the minister as a public office holder. I note that the Office has never been informed of anyone designated under this paragraph as a public office holder.

Reporting Public Office Holders

The Act applies to all public office holders, but the disclosure and public reporting requirements, the divestment measures and other more stringent post-employment provisions apply only to a subset of public office holders referred to in the Act as "reporting public office holders".

The expression "reporting public office holder" is defined in subsection 2(1) of the Act as follows:

> *"reporting public office holder" means a public office holder who is*
>
> *(a) a minister of the Crown, minister of state or parliamentary secretary;*
>
> *(b) a member of ministerial staff who works on average 15 hours or more a week;*
>
> *(c) a ministerial adviser;*
>
> *(d) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a part-time basis but receives an annual salary and benefits;*
>
> *(e) a Governor in Council appointee, or a ministerial appointee whose appointment is approved by the Governor in Council, who exercises his or her official duties and functions on a full-time basis; or*
>
> *(f) a full-time ministerial appointee designated by the appropriate minister of the Crown as a reporting public office holder.*

The definition sets out the various classes of individuals who are reporting public office holders for the purposes of the Act.

I identify two instances below where the application of this definition has been problematic.

Interns and summer students in ministers' offices

Students who work full-time during the summer months as ministerial staff are included under the Act as reporting public office holders. In my opinion, the heightened level of obligations that apply to them is unnecessary given the short term of employment and the nature of the work usually performed by these individuals. This is particularly true with respect to rules of conduct prohibiting specified outside activities (section 15), the prohibition against holding controlled assets (section 17), and the requirement to divest controlled assets (section 27). Furthermore, with respect to the requirement to complete their initial compliance process within 120 days, their employment does not usually extend much beyond this period.

This situation could be addressed directly by excluding interns and summer students on ministerial staff from paragraph (*b*) of the definition of reporting public office holder. If they were excluded in this way, they would continue to meet the definition of public office holder.

RECOMMENDATION 2-11

That the definition of "reporting public office holder" expressly exclude interns and summer students who are ministerial staff and have terms of less than six months. They would continue to meet the definition of "public office holder".

Governor in Council acting appointments

There is no exception from the definition "reporting public office holder" for individuals appointed by Governor in Council in an acting capacity on a temporary basis or for a short term.

My Office considers the length of the acting appointment to determine the appropriate measures to be applied in these cases for the individuals to comply with the divestment and other requirements of the Act.

This situation could be addressed directly by excluding individuals appointed in an acting capacity on a temporary basis, or for a term of six months or less from the definition of "reporting public office holder". If they were excluded in this way, they would continue to meet the definition of public office holder.

RECOMMENDATION 2-12

That the definition of "reporting public office holder" expressly exclude individuals appointed by Governor in Council in an acting capacity on a temporary basis for six months or less, or for a term of six months or less. They would continue to meet the definition of "public office holder".

CHAPTER 3: RULES OF CONDUCT – PART 1 (SECTIONS 4-19)

The rules of conduct for public office holders are set out in Part 1 of the *Conflict of Interest Act* (Act). Specific compliance measures, including reporting and disclosure requirements related to those rules of conduct, are set out in Part 2 of the Act and will be addressed in Chapter 4 of this submission.

In this chapter, I will examine each of the rules of conduct in turn, with a discussion of challenges I have encountered in applying them, and recommendations for amendments to address them. I have, in some cases, recommended draft language to modify the Act.

CONFLICT OF INTEREST

In the previous chapter, I recommended that the current section 4 be moved into section 2, the interpretation section. The current section 4 is often mistaken for a substantive rule of conduct, and I would recommend that a clear substantive provision be substituted for it. That provision could provide that a public office holder must not exercise an official power, duty or function if the public office holder knows or reasonably should know that he or she would be in a conflict of interest. This rule would be more general than section 6, set out below, which is limited to decision-making.

RECOMMENDATION 3-1

That a new general section 4 be included in Part 1 of the Act that would prohibit public office holders from exercising an official power, duty or function if they know or reasonably should know that they would be in a conflict of interest.

GENERAL DUTY

Section 5 of the Act sets out a general duty for public office holders to arrange their affairs so as to avoid a conflict of interest. It reads as follows:

> ***5.*** *Every public office holder shall arrange his or her private affairs in a manner that will prevent the public office holder from being in a conflict of interest.*

My Office is available to work with public office holders to assist them in complying with section 5. For example, a conflict of interest screen might be established in order to avoid situations that could lead to the need for a recusal.

I do not recommend any change to this section.

DECISION-MAKING

Section 6 prohibits public office holders from making decisions or participating in making decisions that would place them in a conflict of interest. That section reads as follows:

> ***6.*** *(1) No public office holder shall make a decision or participate in making a decision related to the exercise of an official power, duty or function if the public office holder knows or reasonably should know that, in the making of the decision, he or she would be in a conflict of interest.*
>
> *(2) No minister of the Crown, minister of state or parliamentary secretary shall, in his or her capacity as a member of the Senate or the House of Commons, debate or vote on a question that would place him or her in a conflict of interest.*

I do not recommend any change to this section.

PREFERENTIAL TREATMENT

Section 7 prohibits preferential treatment but is limited to one specific circumstance, where the preferential treatment is based on the identity of a person or organization representing the person or organization that is given the preferential treatment. Section 7 reads as follows:

> ***7.*** *No public office holder shall, in the exercise of an official power, duty or function, give preferential treatment to any person or organization based on the identity of the person or organization that represents the first-mentioned person or organization.*

It is difficult to understand why section 7 is limited in this way. It should be broadened to prohibit all instances of preferential treatment, and not be restricted as it currently is.

I also recommend that the word "entity" be substituted for the word "organization" in keeping with my recommended addition of the word "entity" to the definition of "conflict of interest" (Recommendation 2-3). The word "entity" is broader than the word "organization" and its use would result in the same terminology being used in the Act and the *Conflict of Interest Code for Members of the House of Commons* (Members' Code).

RECOMMENDATION 3-2

That section 7 be amended as follows:

- *to remove the limiting words "based on the identity of the person or organization that represents the first-mentioned person or organization"; and*
- *to substitute the word "entity" for the word "organization".*

INSIDER INFORMATION

Section 8 prohibits the use of insider information to advance certain private interests. It reads as follows:

> ***8.*** *No public office holder shall use information that is obtained in his or her position as a public office holder and that is not available to the public to further or seek to further the public office holder's private interests or those of the public office holder's relatives or friends or to improperly further or to seek to improperly further another person's private interests.*

The prohibition is absolute in relation to furthering or seeking to advance the private interests of the public office holder or his or her relatives or friends. In relation to any other person, the prohibition is contingent on there being an impropriety as well.

In keeping with my recommended change to the definition of "conflict of interest" (Recommendation 2-3), the word "entity" should be added to the concluding words of this section.

RECOMMENDATION 3-3

That the concluding words of section 8 be broadened to include a reference to improperly furthering or seeking to improperly further the private interests of an "entity" as well as a "person".

INFLUENCE

Section 9 prohibits public office holders from using their positions to seek to influence another person's decision in a way that would further certain private interests. It reads as follows:

> ***9.*** *No public office holder shall use his or her position as a public office holder to seek to influence a decision of another person so as to further the public office holder's private interests or those of the public office holder's*

relatives or friends or to improperly further another person's private interests.

In keeping with my recommended change to the definition of "conflict of interest" (Recommendation 2-3), the word "entity" should be added to the concluding words of this section.

RECOMMENDATION 3-4

That the concluding words of section 9 be broadened to include a reference to improperly furthering the private interests of an "entity" as well as a "person".

OFFERS OF OUTSIDE EMPLOYMENT

Section 10 addresses the possibility of a public office holder being influenced by an offer of outside employment. It reads as follows:

> ***10.*** *No public office holder shall allow himself or herself to be influenced in the exercise of an official power, duty or function by plans for, or offers of, outside employment.*

The purpose of section 10 is to prevent public office holders from being influenced by the prospect of future employment. In order for section 10 to achieve its purpose, the expression "outside employment" should be interpreted to include contracts of service, appointments to a board of directors, partnership relationships as well as employment. I recommend that section 10 be amended to expressly include all of these arrangements. I make the same recommendation in relation to section 24, which requires the disclosure of offers of outside employment (Recommendation 4-9).

I note that contractual relationships and appointments to boards of directors are already expressly included in the related post-employment rule in subsection 35(1) but partnership relationships are not. I recommend in Chapter 5 that a reference to partnerships be added in that subsection (Recommendation 5-2).

RECOMMENDATION 3-5

That section 10 be amended to expressly include contracts of service, appointments to boards of directors and partnership relationships as well as employment relationships.

GIFTS AND OTHER ADVANTAGES

My Office is asked for advice on the acceptability of gifts more frequently than anything else. Section 11 establishes the general rule that gifts or other advantages may not be accepted if they might reasonably be seen to have been given to influence a public office holder.

A definition of "gift or other advantage" is found in subsection 2(1). It reads as follows:

"gift or other advantage" means

(a) an amount of money if there is no obligation to repay it; and
(b) a service or property, or the use of property or money that is provided without charge or at less than its commercial value.

Section 11 reads as follows:

11.*(1) No public office holder or member of his or her family shall accept any gift or other advantage, including from a trust, that might reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function.*

(2) Despite subsection (1), a public office holder or member of his or her family may accept a gift or other advantage

(a) that is permitted under the Canada Elections Act*;*
(b) that is given by a relative or friend; or
(c) that is received as a normal expression of courtesy or protocol, or is within the customary standards that normally accompany the public office holder's position.

(3) When a public office holder or a member of his or her family accepts a gift or other advantage referred to in paragraph (2)(c) that has a value of $1,000 or more, the gift or other advantage is, unless otherwise determined by the Commissioner, forfeited to Her Majesty in right of Canada.

Acceptability and disclosure

Public office holders often erroneously believe that gifts or other advantages valued at less than $200 are automatically acceptable. This is not the case. Section 23 and subsection 25(5), addressed in Chapter 4, require that all reporting public office holders publicly declare any gift or other advantage that meets the acceptability test if it is valued at $200 or

more. However, the $200 limit relates only to disclosure to my Office and public reporting, and not to the acceptability of the gift or other advantage.

The acceptability of any gift, regardless of its value, must be determined in accordance with the test set out in subsection 11(1). No public office holder, or member of his or her family, can accept a gift of any value if it can reasonably be seen to have been given to influence the public office holder in the exercise of an official power, duty or function.

A public office holder may keep a gift if it meets the acceptability test with one exception. Gifts or other advantages received as a normal expression of courtesy or protocol, as described in paragraph 11(2)(*c*), that are valued at $1,000 or more must be forfeited to the Crown.

As discussed in Chapter 1 and referred to again in Chapter 4, there are no disclosure or reporting obligations for non-reporting public office holders. I recommend in Chapter 1 (Recommendation 1-1) and in Chapter 4 (Recommendations 4-26 and 4-27) that disclosure and public reporting obligations apply to non-reporting public office holders in relation to gifts.

In my past annual reports under the Act, I have noted the difficulty in ensuring that public office holders are aware of and comply with their obligations under the Act with respect to gifts and other advantages. I have established procedures for some reporting public office holders who frequently receive gifts to provide regular monthly or bi-weekly reports of gifts they have received in that period. This has facilitated timely disclosure by these individuals. As well, reporting public office holders are all reminded of these obligations during the annual review process.

My Office has also issued guidelines on gifts under the Act, and conducts a range of outreach activities targeted at enhancing public office holders' awareness of their obligations. However, I believe that there are still a number of public office holders who may not fully understand the rules.

In the context of the five-year review of the *Conflict of Interest Code for Members of the House of Commons*, I made several recommendations with respect to gifts with a view to increasing the frequency with which gifts are disclosed to my Office by Members and publicly declared. I recommended for the Members' Code a threshold of a minimal amount such as $30.

I believe that the Act would benefit from an amendment along the same lines. Specifically, I recommend that the Act be modified to require that all gifts above a minimal threshold received by reporting public office holders be disclosed to the Office of the Conflict of Interest and Ethics Commissioner and that they be publicly declared. This would both increase transparency and simplify the gift rules.

The acceptability test would remain unchanged for gifts. Public office holders would still not be able to accept a gift or other advantage if it could reasonably be seen to have been given to influence them.

Setting a lower threshold for disclosure to the Commissioner and public reporting would result in more communication between public office holders and my Office about gifts and would increase the overall transparency of what gifts are received by public office holders. A recommendation to this effect is included in Chapter 4 (Recommendation 4-8).

I also recommend in Chapter 6 (Recommendation 6-13) that administrative monetary penalties apply for some substantive breaches of the Act, including accepting a gift or other advantage that does not meet the test set out in section 11.

Tickets to events

Another area of concern is the situation where tickets or invitations to special events, such as sports events, dinners or galas, are offered to public office holders. Where such a gift, already accepted, is found to be unacceptable and considered to be a contravention of the Act, I require that the fair market value of the ticket or invitation be paid or reimbursed.

I note, however, that this measure does not address the fact that the public office holder has, in many cases, been given privileged access to the event, whether in a special box or otherwise, that is not offered to the general public. As well, in the case of an event that a public office holder attends along with the person offering the tickets, that person is given special access to the public office holder that would not generally be available to others.

Forfeiture of gifts over $1000

I cannot leave this section without at least mentioning the issue of forfeiture. Subsection 11(3) provides for the forfeiture of certain gifts or other advantages. To my knowledge, there are no guidelines for the treatment of forfeited goods beyond the general regulations of the Treasury Board, which leave the matter to the discretion of the individual departments concerned.

Putting the gift provisions together

The inherent complexity of the gift rules is intensified by the way the Act is organized. There are three separate sections that deal with gifts: section 11 deals with the circumstances in which gifts may or may not be accepted; section 23 deals with the disclosure of gifts to my Office; and subsection 25(5) deals with the public declaration of gifts.

I recommend that a reference to all provisions relating to gifts be made in section 11. This would assist public office holders in understanding the extent of the rules relating to gifts. The rules in section 23 and subsection 25(5) should, however, continue to refer to the

disclosure and reporting obligations for gifts along with the other disclosure and reporting requirements.

RECOMMENDATION 3-6

That section 11 include references to the other provisions relating to gifts, namely section 23 and subsection 25(5).

TRAVEL

Section 12 prohibits travel by ministers and certain others on non-commercial chartered or private aircraft except in exceptional circumstances or with the prior approval of the Commissioner. It reads as follows:

> ***12.*** *No minister of the Crown, minister of state or parliamentary secretary, no member of his or her family and no ministerial adviser or ministerial staff shall accept travel on non-commercial chartered or private aircraft for any purpose unless required in his or her capacity as a public office holder or in exceptional circumstances or with the prior approval of the Commissioner.*

As in the case of section 11, the reporting requirements under section 25(6) should be reflected in section 12 to assist public office holders in understanding their obligations, but subsection 25(6) itself should remain with the other reporting requirements.

RECOMMENDATION 3-7

That the reporting requirements relating to travel on non-commercial aircraft under subsection 25(6) be referred to in section 12.

CONTRACTS WITH PUBLIC SECTOR ENTITIES

Section 13 is relatively straightforward. It prohibits ministers and parliamentary secretaries from entering into most contracts with public sector entities where they receive a benefit or have an interest in the matter.

I have no recommendations in relation to section 13.

CONTRACTING WITH FAMILY MEMBERS

Section 14 includes various prohibitions relating to public office holders contracting with or employing certain relatives.

I have no recommendation in relation to section 14.

PROHIBITED ACTIVITIES

Section 15 prohibits reporting public office holders from engaging in a range of outside activities listed in subsection 15(1). Subsections 15(1.1), (2) and (3) set out exceptions. Section 15 reads as follows:

[*Prohibited activities]*

15. *(1) No reporting public office holder shall, except as required in the exercise of his or her official powers, duties and functions,*

(a) engage in employment or the practice of a profession;
(b) manage or operate a business or commercial activity;
(c) continue as, or become, a director or officer in a corporation or an organization;
(d) hold office in a union or professional association;
(e) serve as a paid consultant; or
(f) be an active partner in a partnership.

[Exception]

(1.1) Despite paragraph (1)(a), for the purpose of maintaining his or her employment opportunities or ability to practice his or her profession on leaving public office, a reporting public office holder may engage in employment or the practice of a profession in order to retain any licensing or professional qualifications or standards of technical proficiency necessary for that purpose if

(a) the reporting public office holder does not receive any remuneration; and
(b) the Commissioner is of the opinion that it is not incompatible with the reporting public office holder's duties as a public office holder.

[Exception]

> *(2) Despite paragraph (1)(*c*), a reporting public office holder who is a director or officer in a Crown corporation as defined in section 83 of the* Financial Administration Act *may continue as, or become, a director or officer in a financial or commercial corporation but only if the Commissioner is of the opinion that it is not incompatible with his or her public duties as a public office holder.*

[Exception]

> *(3) Despite paragraph (1)(c), a reporting public office holder may continue as, or become, a director or officer in an organization of a philanthropic, charitable or non-commercial character but only if the Commissioner is of the opinion that it is not incompatible with his or her public duties as a public office holder.*

[Political activities]

> *(4) Nothing in this section prohibits or restricts the political activities of a reporting public office holder.*

Section 15 establishes a broad prohibition against reporting public office holders engaging in the outside activities listed in subsection 15(1). The prohibition does not depend on whether or not participating in the outside activity would place the reporting public office holder in a conflict of interest or be incompatible with his or her public duties.

Aside from the limited exceptions covered in subsections 15(1.1), (2) and (3), the Commissioner is given no discretion to waive the prohibition against engaging in outside activities in cases that may cause hardship or unnecessary interference with the personal life of a reporting public office holder where there is no incompatibility with his or her official duties. For example, there is no exception for short-term summer students (usually ministerial staff) who wish to maintain the part-time jobs that they have during the school year, or for reporting public office holders to sell crafts as a personal leisure-time pursuit or to operate a hobby farm that sells a small amount of produce. Nor can a reporting public office holder hold office in a professional association, even where there would appear to be no conflict of interest. These are just a few examples of the situations where section 15 would appear to be unnecessarily restrictive.

The rationale for the broad prohibitions in subsection 15(1) is not clear. It would appear to be based on considerations related to ensuring that a reporting public office holder gives an appropriate level of time and attention to his or her position as a reporting public office holder. An appropriate consideration might be whether the outside activity is compatible with the

public duties of the reporting public office holder. It is significant that this is the test that the Commissioner must apply to decide whether to grant one of the exceptions under subsections 15(1.1), (2) or (3).

I believe that the Commissioner should be given the authority to permit a reporting public office holder to engage in any of the activities listed in subsection 15(1) if, in the opinion of the Commissioner, the activity is not incompatible with the reporting public office holder's public duties or obligations as a public office holder, including obligations under the *Conflict of Interest Act*. Such an amendment would make subsections 15(1.1), (2) and (3) essentially redundant.

If this approach were taken, all outside activities authorized by the Commissioner should continue to be publicly declared under subsection 25(4).

RECOMMENDATION 3-8

That the Commissioner be given the authority to permit reporting public office holders to engage in outside activities prohibited by subsection 15(1) where this would not be incompatible with the reporting public office holder's public duties or obligations as a public office holder.

I note that the new exception made in December 2011 to allow reporting public office holders to engage in employment or the practice of a profession in order to retain any licensing or professional qualifications does not require a public declaration. As I stated in my 2011-12 Annual Report, I suspect that this must have been an oversight. I recommend in Chapter 4 (Recommendation 4-12) that an amendment be made to subsection 25(4) to rectify this omission if the previous recommendation is not acted upon.

Discrepancies in the English and French versions

Generally, I have found few instances where the English and French versions in the Act differ significantly. However, I do note one discrepancy in section 15 between the two versions.

The English version of subsection 15(3) differs slightly from the French version. The words "non-commercial character" is reflected in the French as "à but non lucratif". These concepts are slightly different. Both should be incorporated into each version. In the English the words "not-for-profit corporation" should be added and in the French the words "non-commercial" should be added.

RECOMMENDATION 3-9

That section 15(3) be amended to include references to both concepts, "non-commercial character" and "not for profit", in the French and English versions to describe the types of organizations referred to in subsection 15(3).

FUNDRAISING

Section 16 of the Act prohibits fundraising if it would place a public office holder in a conflict of interest. Section 16 reads as follows:

> **16.** *No public office holder shall personally solicit funds from any person or organization if it would place the public office holder in a conflict of interest.*

I have had occasion in several examination reports to comment on the issue of fundraising by ministers and parliamentary secretaries. All public office holders, including ministers and parliamentary secretaries, may personally solicit funds if the activity does not place them in a conflict of interest. However, the potential for a conflict of interest is higher for a minister or a parliamentary secretary than for other public office holders. Even where a current conflict of interest does not exist, there is the risk that, as a result of the fundraising, they could potentially, in the future, be in breach of other sections of the Act, such as section 6 (decision-making) or 7 (preferential treatment). Public office holders cannot always anticipate when a future conflict of interest will arise.

I note that the guide administered by the Privy Council Office, *Accountable Government: A Guide for Ministers and Ministers of State 2011*, can be helpful for Ministers and Ministers of state with respect to political fundraising, but it does not prohibit them from undertaking this activity.

RECOMMENDATION 3-10

That a more stringent rule with respect to fundraising than the current one in section 16 be established for ministers and parliamentary secretaries.

DIVESTITURE OF CONTROLLED ASSETS

Section 17 sets out the general rule that reporting public office holders cannot hold controlled assets. It reads as follows:

> **17.** *No reporting public office holder shall, unless otherwise provided in Part 2, hold controlled assets as defined in that Part.*

One must turn to section 20 in Part 2 of the Act, for the definition of “controlled assets”. Section 27, also in Part 2 of the Act, sets out the rules for divesting controlled assets. They can be divested either by selling them in an arm’s length transaction or by placing them in a blind trust.

I have, on numerous occasions, indicated that I believe that the scope of section 17 is too broad. This section prohibits reporting public office holders from holding controlled assets, regardless of whether a conflict of interest exists. I believe that the requirement that all reporting public office holders divest themselves of controlled assets without reference to a conflict of interest test goes beyond what is necessary to accomplish the purposes of the Act.

I am mindful as well of the costs incurred when individuals choose to avail themselves of the option to place their assets in a blind trust. The costs of administering these trusts are generally based on a percentage of the person's holdings and can sometimes amount to thousands of dollars per year. These costs are passed on to the government, as there is provision for reimbursement to the reporting public office holder.

In addition to this, there are often challenging situations where assets are shared or controlled in partnership with other people who are not subject to the Act, such as spouses, siblings or parents. In these instances, compliance with these provisions by the reporting public office holder may create a negative financial impact on the other person. It is difficult in these cases to find solutions that do not cause difficulty for the person who is not a reporting public office holder. Recommendation 3-11, below, would result in these situations arising less frequently. As well, I will continue to use my discretion under section 29 to determine appropriate measures to ensure compliance with the Act.

The divestment rules apply to all reporting public office holders, not just to those who have a significant amount of decision-making power or access to privileged information, such as ministers, ministers of state, parliamentary secretaries, chiefs of staff and deputy ministers. Students, interns, short-term appointees, members of boards and tribunals are all also subject to these provisions, although it seems far less likely that they would be privy to or charged with decisions that would provide insider information or affect their assets or those of friends or relatives.

Ministers, ministers of state and parliamentary secretaries, as well as certain senior reporting public office holders such as chiefs of staff and deputy ministers may be more likely to be in positions where they could further their own private interests or that of friends or relatives. For this reason, they should be subject to more stringent requirements.

I recommend that section 17 be amended to restrict the current prohibition against holding controlled assets to those with a significant amount of decision-making power or access to privileged information. The prohibition should apply to all other reporting public office holders only if holding the controlled assets would place them in a conflict of interest. I make related recommendations in Chapter 4 in relation to section 27 (Recommendations 4-18 and 4-19).

RECOMMENDATION 3-11

That section 17 of the Act be amended to prohibit reporting public office holders who have a significant amount of decision-making power or access to privileged information, such as ministers, ministers of state, parliamentary secretaries, chiefs of staff and deputy ministers, from holding controlled assets, and to prohibit all other reporting public office holders from holding controlled assets only where to do so would place them in a conflict of interest.

There is one way in which the prohibition in section 17 is too narrow. There have been instances where a reporting public office holder does not hold controlled assets directly, but holds them indirectly through a holding company or other similar mechanisms. Those instances should be included as well.

RECOMMENDATION 3-12

That section 17 be amended to cover cases where controlled assets are held indirectly as well as directly.

ANTI-AVOIDANCE

Section 18 applies to the situation where a public office holder takes steps to avoid his or her obligations under the Act, even if there is no resulting contravention. Section 18 reads as follows:

> **18.** *No public office holder shall take any action that has as its purpose the circumvention of the public office holder's obligations under this Act.*

I do not recommend any change to this section.

CONDITION OF APPOINTMENT OR EMPLOYMENT

Section 19 establishes that compliance with the Act is a condition of employment or appointment. It reads as follows:

> **19.** *Compliance with this Act is a condition of a person's appointment or employment as a public office holder.*

Section 19 underlines the importance of the conflict of interest rules contained in the Act. The government could, on the basis of section 19, terminate the appointment or employment of a public office holder if he or she fails to comply with the Act.

I have no recommendations in relation to section 19.

CHAPTER 4: COMPLIANCE MEASURES—PART 2 (SECTIONS 20–32)

Part 2 of the *Conflict of Interest Act* (Act) sets out a variety of compliance measures dealing with recusals, disclosures made confidentially to the Commissioner, public declarations and divestment of controlled assets, as well as with the functions of the Commissioner in relation to these measures. Most of these provisions apply specifically to reporting public office holders. In this chapter, I will address some of the issues and challenges that I have encountered in relation to Part 2 of the Act and will suggest some amendments in relation to them.

At the outset, I would also like to underline the importance of the advisory role of my Office. While public office holders can contact my Office at any time for advice, the reporting requirements provide a structured opportunity to assess the situation of every reporting public office holder in relation to the Act and to establish any measures that might be necessary.

DEFINITIONS—SECTION 20

A reporting public office holder must provide, as required by section 22, a confidential report to the Commissioner containing a description of all of his or her assets, liabilities and income as well as all activities in which he or she was engaged or involved in during the two-year period preceding the day of appointment.

Section 20 includes a general definition of "assets" as well as detailed definitions of two categories of assets, namely "exempt assets" and "controlled assets". A third category of assets, although not named or defined, is referred to in subsection 25(2), which requires that assets that are neither controlled nor exempt be publicly declared. My Office refers to these as "declarable assets".

Exempt assets

Exempt assets are defined as "assets and interests in assets for the private use of public office holders and the members of their family and assets that are not of a commercial character". The definition includes a lengthy list of examples (paragraphs (*a*) to (*q*)). New investment vehicles and products are regularly introduced by governments and the financial services sector, which are, therefore, not specifically referred to in that list. Examples of these new investment vehicles are exchange-traded funds, index and commodities-linked notes, Capital régional and coopératif Desjardins hedge funds, labour-sponsored funds, tax-free savings accounts and registered disability savings plans. Some of these new investment vehicles could fall within the general definition of exempt assets and others could fall within the general definition of controlled assets.

I have interpreted the list in the definition of exempt assets to be non-exhaustive. However, to provide for greater clarity, I would recommend that the English version of the

definition be amended to include the words "but not limited to" before the list to make it clear that the list is not exhaustive. Adding these words would also make the definition consistent with the approach taken in the English version of the definition of controlled assets.

RECOMMENDATION 4-1

That the definition of "exempt assets" in the English version of section 20 be amended to include the words "but not limited to" to make it clear that the list of examples is not exhaustive.

Paragraphs (*n*) and (*o*) of the definition of "exempt assets" deal with loans, mortgages and hypothecs. Paragraph (*n*) provides that personal loans receivable from the public office holder's relatives are exempt assets irrespective of the amount. Paragraph (*o*) does not distinguish between relatives and other borrowers in relation to money owed under a mortgage or hypothec. It merely exempts money owed by anyone, whether a relative or not, under a mortgage or hypothec of less than $10,000. I would recommend that all moneys of any value owed by a relative, whether or not under a mortgage or hypothec, be considered to be exempt.

RECOMMENDATION 4-2

That paragraphs (n) and (o) be amended to exempt all moneys, whatever the amount, owed by relatives, whether or not under a mortgage or hypothec.

Controlled Assets

I noted in my 2007-2008 Annual Report that I consider the definition of "controlled assets" to be overly broad in that it includes any assets whose value could be directly or indirectly affected by government decisions or policy. In applying this section, I have taken note of the fact that the list in the definition is composed only of financial instruments. As a result, I have interpreted the divestment provisions to include only investments that are publicly traded on a stock exchange or over-the-counter and in situations where commodities, futures and currencies are traded on a commodities exchange.

Accordingly, stock options, warrants and rights have been considered to be controlled assets only where they are publicly traded or linked to publicly traded securities. Publicly traded securities held in registered accounts, plans or funds that are self-administered are also considered to be controlled assets.

I recommend that the wording of the definition of "controlled assets" be adjusted to reflect this approach.

RECOMMENDATION 4-3

That the definition of "controlled assets" in section 20 be limited to publicly traded securities traded on a stock exchange or over-the-counter, including such assets within self-administered registered accounts, and to commodities, futures and currencies that are traded on a commodities exchange.

Declarable Assets

A third category of assets, although not named or defined, is referred in subsection 25(2), which requires that assets that are neither controlled nor exempt be publicly declared. My Office refers to these as "declarable assets". For greater clarity, I would recommend adding a definition of "declarable assets" to section 20.

RECOMMENDATION 4-4

That the Act be amended to include a definition of "declarable assets" in section 20 that would include, but not be limited to, the following assets:

- *ownership interests in businesses, private corporations and commercial farms;*
- *investments in limited partnerships that are not publicly traded;*
- *rental property;*
- *personal loans of $10,000 or more receivable from persons other than the public office holder's relatives; and*
- *money owed under a mortgage or hypothec with an outstanding balance of $10,000 or more from persons other than the public office holder's relatives.*

RECUSAL—SECTION 21

Recusal is an important obligation in any conflict of interest regime. It relates to the prohibitions in section 6 of the Act against a public office holder making a decision or debating or voting on a decision where doing so would place the public office holder in a conflict of interest.

Section 21, unlike the other provisions in Part 2, applies to all public office holders, not only reporting public office holders. As I noted in my 2009-2010 Annual Report, a "recusal" occurs when a public office holder removes himself or herself from involvement in a specific matter that is before, or is about to come before, the public office holder.

Very few recusals have been reported. There are a number of mechanisms in the Act that reduce the need for recusals, such as divestment of assets under section 27 and the

prohibitions relating to outside activities in section 15. In addition, my Office has arranged for public office holders to set up conflict of interest screens to avoid situations where a conflict of interest could very likely arise. This is done in collaboration with public office holders under the authority of section 29, referred to later in this chapter.

These screens provide sufficient detail to identify the potential conflict of interest situations in relation to which they are developed. I require the public office holders to sign a document that describes the potential conflict and establishes the measures that are to be put in place to avoid the conflict.

I recommend that section 21 be amended to add a subsection that would reflect the practice of establishing conflict of interest screens where a public office holder foresees that future recusals may likely be necessary in order to avoid a conflict of interest. Later in this chapter (Recommendation 4-11), I recommend that these screens be made available for public examination in the public registry in accordance with paragraph 51(1)(*a*) of the Act. I currently use my discretion under paragraph 51(1)(*e*) to make these screens available for public examination.

RECOMMENDATION 4-5

That section 21 be amended to provide expressly for the establishment of conflict of interest screens by public office holders in consultation with the Commissioner where a conflict of interest could very likely arise.

CONFIDENTIAL REPORT—SECTION 22

Section 22 sets out the disclosures that reporting public office holders must make to the Commissioner in a confidential report within 60 days of appointment as well as the requirement to notify the Commissioner of any material change in any matter required to be reported under section 22 within 30 days after the change occurs. This section is central to the administration of the Act.

There are several technical amendments that should be made to subsection 22(2). That subsection reads as follows:

> ***22.*** *(2) The report required under subsection (1) must contain the following:*
>
> *(a) a description of all of the reporting public office holder's assets and an estimate of their value;*
> *(b) a description of all of the reporting public office holder's direct and contingent liabilities, including the amount of each liability;*
> *(c) a description of all income received by the reporting public office holder during the 12 months before the day of appointment and all*

income the reporting public office holder is entitled to receive in the 12 months after the day of appointment;

(d) a description of all activities referred to in section 15 in which the reporting public office holder was engaged in the two-year period before the day of appointment;

(e) a description of the reporting public office holder's involvement in philanthropic, charitable or non-commercial activities in the two-year period before the day of appointment;

(f) a description of all of the reporting public office holder's activities as trustee, executor or liquidator of a succession or holder of a power of attorney in the two-year period before the day of appointment; and

(g) any other information that the Commissioner considers necessary to ensure that the reporting public office holder is in compliance with this Act.

Paragraph 22(2)(*b*) should require that the description of the direct and contingent liabilities specify the nature, source and amount of these liabilities. This paragraph should also include an express mention of child and spousal support payments as well as court judgments to make it clear that they are included.

Paragraph 22(2)(*d*) requires that activities referred to in section 15 be reported by a reporting public office holder if the activities were engaged in during the two-year period before the day of appointment. Similarly, paragraph 22(2)(*e*) requires that a description of a reporting public office holder's involvement in philanthropic, charitable or non-commercial activities during the same two-year period be reported. These paragraphs should also require that such activities be reported if they are engaged in on or after appointment.

Activities of reporting public office holders as trustee, executor or liquidator of a succession or holder of a power of attorney are not relevant for the purposes of the application of the Act, so paragraph 22(2)(*f*) should be amended to include such activities only if they are engaged in on or after the day of appointment.

RECOMMENDATION 4-6

That section 22 be amended to include the following technical amendments:

- *paragraph 22(2)(b) should require that the description of liabilities under that paragraph specify the nature, source and amount of the liabilities;*
- *it should be made clear that child and spousal support payments and court judgments are included under paragraph 22(2)(b);*
- *paragraph 22(2)(d) and (e) should require that the activities referred to in those paragraphs be reported if they are engaged in on or after appointment as well as those engaged in during the two-year period before appointment;*
- *paragraph 22(2)(f) should only require the reporting of activities as trustee, executor or liquidator of a succession or holder of a power of attorney that occur on or after the day of appointment.*

Subsections 22(1) to (4) relate only to the initial confidential report required in the 60 days following the appointment of a reporting public office holder. The obligation to report material changes under subsection 22(5) is ongoing for the whole time that a reporting public office holder holds office. This obligation can easily be overlooked because it is included in the same section as the initial reporting requirements. I therefore recommend that subsection 22(5) become a separate section following section 22.

RECOMMENDATION 4-7

That subsection 22(5), dealing with the reporting of material changes, become a separate section following section 22 to make it clear that this is an ongoing obligation.

I recommend some further amendments to section 22 in relation to non-reporting public office holders later in this chapter (Recommendations 4-22 and 4-23).

GIFTS—SECTION 23

Where the total value of all gifts or other advantages accepted in a 12-month period by a reporting public office holder, or a member of his or her family, exceeds $200 from any one source, other than from relatives or friends, section 23 requires the reporting public office holder to disclose such gifts or advantages to the Commissioner within 30 days after the day on which the value exceeds $200.

In Chapter 3, I recommend that the Act be amended to enhance the disclosure obligations of reporting public office holders with respect to gifts and other advantages that are accepted in connection with their official responsibilities. I also recommend that the disclosure threshold referred to in section 23 be lowered to a minimal amount such as $30 (individual or cumulative) in order to increase transparency in this domain and provide clarity.

RECOMMENDATION 4-8

That the threshold for disclosing gifts or other advantages accepted from any one source be reduced to a minimal amount (such as $30, individually or cumulatively).

I recommend a further amendment to section 23 in relation to non-reporting public office holders later in this chapter (Recommendation 4-26).

OFFERS OF EMPLOYMENT—SECTION 24

Subsection 24(1) requires reporting public office holders to disclose in writing all firm offers of outside employment to the Commissioner within seven days after receiving such an offer. Similarly, subsection 24(2) requires reporting public office holders to disclose the acceptance of all firm offers of outside employment in writing to the Commissioner within 7 days of accepting such an offer. The disclosure requirements set out in section 24 allow my Office to review the circumstances around these offers and to provide advice in light of a reporting public office holder's post-employment obligations in Part 3 of the Act.

As noted in my 2010-2011 Annual Report, I have interpreted the term "employment" in section 24 broadly, to include not only employment but also contracts of service and appointments to boards of directors. I see no reason why contracts of service and appointments to boards of directors as well as partnership relationships should be excluded from the application of section 24 or be treated differently from offers of employment. I therefore recommend that section 24 be amended to expressly include contracts of service, appointments to boards of directors and partnership relationships. I have made a similar recommendation in Chapter 3 in relation to section 10 (Recommendation 3-5).

I note that contracts of service and appointments to boards of directors are expressly included in the related post-employment rule in subsection 35(1). I recommend, in Chapter 5, that a reference to partnerships be added to subsection 35(1) (Recommendation 5-2).

RECOMMENDATION 4-9

That section 24 be amended to require reporting public office holders to disclose, in addition to firm offers of employment, firm offers relating to contracts of service, appointments to boards of directors and partnership relationships.

PUBLIC DECLARATION—SECTION 25

Section 25 requires reporting public office holders to make public declarations in respect of specific matters. The deadlines for these public declarations vary from 30 days to 120 days, depending on the subject matter of the declaration.

The Act sets out deadlines for public declarations rather than for disclosure of information to the Commissioner. This has created some confusion because disclosures are sometimes made at the last minute to my Office, leaving no time to make them public within the deadline. Although this anomaly has not created any major problems, the language should be adjusted to clearly place the responsibility on reporting public office holders to disclose the information to the Commissioner within the deadline. The Commissioner would then proceed with the public declaration as soon as possible, as is done now as a matter of practice.

I recommend that section 25 be amended to remove the references to public declarations and to replace them with references to disclosure obligations to the Commissioner for the purposes of public examination.

RECOMMENDATION 4-10

That the wording of section 25 be amended to make it clear that the deadlines currently established are deadlines for reporting public office holders to make the related disclosures to the Commissioner for the purposes of public examination.

If Recommendation 4-5 is accepted, an amendment should also be made to subsection 25(1), which currently only includes recusals, to include conflict of interest screens established pursuant to section 21. All disclosures made under section 25 would result in public declaration in the public registry under paragraph 51(1)(*a*).

RECOMMENDATION 4-11

That, if Recommendation 4-5 is accepted, subsection 25(1), relating to disclosures of recusals, be amended to include conflict of interest screens.

As mentioned in Chapter 3 in relation to section 15, it appears that a requirement for public reporting was inadvertently omitted from subsection 25(4) in relation to the exception under subsection 15(1.1) that allows reporting public office holders to engage in employment or the practice of a profession in order to retain any licensing or professional qualifications.

RECOMMENDATION 4-12

That, if Recommendation 3-8 in Chapter 3 is not accepted, subsection 25(4) be amended to include public reporting of any exception granted under subsection 15(1.1).

Subsection 25(5) requires reporting public office holders to publicly disclose any single gift or advantage accepted that has a value of $200 or more. If Recommendation 4-8 is accepted, I would recommend that the $200 value be reduced to the amount established as a result of that recommendation.

RECOMMENDATION 4-13

That subsection 25(5) be amended to reduce the value of $200 to a lower amount, if a lower amount is established pursuant to Recommendation 4-8.

Subsection 25(6) currently requires that travel on non-commercial aircraft that has been accepted in accordance with section 12 by ministers, ministers of state, parliamentary secretaries, their families, ministerial advisers or ministerial staff be publicly reported by the minister or parliamentary secretary concerned. Because ministerial advisers and ministerial staff are also subject to the Act, they should also be required to report this travel themselves.

RECOMMENDATION 4-14

That subsection 25(6) be amended to add ministerial advisers and ministerial staff to those required to make a public declaration in respect of travel on non-commercial aircraft that has been accepted in accordance with section 12.

I recommend further amendments to section 25 in relation to non-reporting public office holders later in this chapter (Recommendations 4-24, 4-25 and 4-27).

SUMMARY STATEMENT—SECTION 26

Section 26 requires reporting public office holders to sign a summary statement within 120 days after the date on which they are appointed. The summary statement is to contain information regarding any compliance orders issued by the Commissioner under section 30 in

relation to the divestment of controlled assets (paragraph 26(2)(*a*)), recusals (paragraph 26(2)(*b*)) and any other matter in respect of which the Commissioner has issued an order (paragraph 26(2)(*c*)).

In a small number of cases each year, it has been difficult to meet the requirement that reporting public office holders sign the summary statement within 120 days after the date of appointment, particularly in situations where it takes almost all of the 120-day period to achieve initial compliance with the Act. A summary statement is not made available for public examination as required by paragraph 51(1)(*b*) until I have confirmed that all compliance measures have been completed.

In light of this situation, I recommend that section 26 be amended to require reporting public office holders to achieve initial compliance with the Act within the 120 days rather than requiring a signature on the summary statement within that time.

RECOMMENDATION 4-15

That section 26 be amended to require that reporting public office holders finalize all initial compliance measures under the Act within 120 days after the date on which they were appointed and that a summary statement be made available on the public registry once this is completed.

While the Act does not require that material changes disclosed to my Office under subsection 22(5) be publicly declared in relation to assets, liabilities and outside activities, I have required a public declaration if the matter would have been declared had it occurred at the time of the initial disclosure process. I recommend that this be reflected in the Act as a specific requirement.

RECOMMENDATION 4-16

That the Act be amended to require that material changes be publicly declared if such a change affects a current declaration or if a public declaration would have been required had this information been disclosed at the time of the initial disclosure process.

The Act does not provide any discretion for the Commissioner to extend any of these deadlines. In practice, I do extend the deadlines where they cannot be met by reporting public office holders for reasons beyond their control, because of the complexity of the arrangements or in exceptional circumstances. This should be reflected in the Act.

RECOMMENDATION 4-17

That the Act be amended to explicitly provide the Commissioner with the discretion to extend all deadlines for disclosures where appropriate.

DIVESTMENT—SECTION 27

Section 27 of the Act sets out strict divestment requirements for reporting public office holders who hold controlled assets. Within 120 days of appointment, reporting public office holders must divest themselves of controlled assets by selling them in an arm's length transaction or by placing them in a blind trust. The only exception to this requirement is a minimum value exception in subsection 27(10), discussed below. In all other circumstances there is no test to determine whether a particular controlled asset will place the reporting public office holder in a potential conflict of interest. As already discussed in relation to section 17, I believe that this rule is overbroad.

If the approach I have suggested in section 17 is adopted, the compliance measures in Part 2 relating to controlled assets would have to be adjusted to reflect this change. I have recommended that the current regime apply only to those who have a significant amount of decision-making power or access to privileged information, such as ministers, ministers of state, parliamentary secretaries, chiefs of staff and deputy ministers.

Other reporting public office holders would only have to divest themselves of their controlled assets if holding them would place them in a conflict of interest. If there is a conflict of interest, I would suggest that these reporting public office holders be required to sell at arm's length those controlled assets that do not meet the test. Divestment through a blind trust would not be appropriate because there would likely only be a conflict of interest in relation to a limited portion of their overall controlled assets. All divestment in these cases should take place by sale in an arm's length transaction.

In the event of a reporting public office holder moving to a new position as a reporting public office holder, if it is determined that his or her new duties, powers or functions result in a conflict of interest in relation to any of the controlled assets that he or she holds, those assets should also be sold in an arm's length transaction.

RECOMMENDATION 4-18

- *That subsection 27(1) be amended to apply only to those reporting public office holders with a significant amount of decision-making power or access to privileged information, such as ministers, ministers of state, parliamentary secretaries, chiefs of staff and deputy ministers; and*
- *That section 27 be amended to require that the controlled assets of all other reporting public office holders be subject to a conflict of interest test. Where there is a conflict of interest, these reporting public office holders would be required to sell those controlled assets in an arm's length transaction.*

Subsection 27(10) currently establishes an exemption from divestment in relation to controlled assets that are "of such minimal value that they do not constitute any risk of conflict of interest […]". If the previous recommendation is accepted, subsection 27(10) would have little application. Ministers, ministers of state and parliamentary secretaries are already excluded from this exception and, for the same reason, the others with a significant amount of decision-making power or access to privileged information should also be excluded. As for the other reporting public office holders, this exception would not apply because they would only be required to divest their controlled assets if these assets resulted in a risk of conflict of interest.

RECOMMENDATION 4-19

If Recommendation 4-18 is accepted, subsection 27(10), which sets out a minimal value exception, would become largely irrelevant and could be repealed.

ANNUAL REVIEW—SECTION 28

Section 28 requires the Commissioner to review with each reporting public office holder, on an annual basis, the information contained in his or her confidential report as well as any measures established to ensure his or her compliance with the Act.

Section 28 does not establish any deadlines for reporting public office holders to complete their annual review or provide for an appropriate enforcement mechanism in the event that they fail to meet their responsibilities under this section.

I therefore recommend that a deadline of 30 days from the date of the letter initiating the annual review process be prescribed for reporting public office holders to comply with this section. I also recommend in Chapter 6 (Recommendation 6-11) that a failure to meet this deadline be subject to an administrative monetary penalty under section 52.

RECOMMENDATION 4-20

That the Act be amended to establish a 30-day deadline for the completion of the annual review process commencing on the date of the letter initiating the annual review process.

DETERMINATION OF APPROPRIATE MEASURES—SECTION 29

Section 29 requires that the Commissioner determine appropriate measures by which to ensure that public office holders comply with the Act. It also requires that, in finalizing such measures, the Commissioner try to achieve agreement with public office holders.

In administering the Act, I have made increasing use of section 29 to establish appropriate compliance measures in the context of unique situations that are not explicitly covered by the Act, including, for example, where a reporting public office holder jointly holds controlled assets with a relative mainly for estate planning purposes. I have found the collaborative nature of the process set out under section 29 to be beneficial in determining appropriate compliance measures in such situations. I currently make most of these measures public under paragraph 51(1)(*e*).

I do not recommend any change to this section.

COMPLIANCE ORDERS—SECTION 30

Section 30 confers discretion upon the Commissioner to order a public office holder, in respect of any matter, to take any compliance measure, including divestment or recusal, that the Commissioner determines to be necessary to comply with the Act.

In contrast to compliance measures determined pursuant to section 29, I do not often need to make use of my authority to issue compliance orders. My practice is to issue compliance orders in circumstances in which it is not possible to reach an agreement with a public office holder on a compliance measure, where I have reason to believe that a public office holder is not adhering to the terms of a compliance measure that has been put in place or, more generally, when a public office holder is uncooperative in establishing an appropriate compliance measure.

I have also had occasion to use section 30 to address contraventions of the Act where the facts are clear and I determine that an examination is therefore not warranted.

I recommend in Chapter 6 an amendment to Part 5 of the Act to authorize orders made under section 30 to be deemed to be an order of the Federal Court for the purpose of enforcement. The need for enforcement orders is discussed in more detail in Chapter 6 in relation to section 48 (Recommendation 6-7).

I also recommend in Chapter 6 an amendment to section 51 that all orders issued under section 30 must be made public on the public registry (Recommendation 6-9).

I do not recommend any change to this section.

REIMBURSEMENT OF COSTS—SECTION 31

Section 31 authorizes the Commissioner to order the reimbursement of administrative costs incurred by public office holders in divesting assets to comply with section 27 and in withdrawing from outside activities prohibited under section 15.

I do not recommend any change to this section.

POST-EMPLOYMENT OBLIGATIONS—SECTION 32

Section 32 requires that the Commissioner inform public office holders of their post-employment obligations before their last day in office.

Although I do inform public office holders of all their obligations, including their post-employment obligations at the time of their initial appointment, my Office is dependent on individual public office holders, ministers' offices and the Privy Council Office to obtain public office holders' precise dates of departure in order to be able to give timely advice prior to their departures. This information is not always provided to my Office before a public office holder's last day in office. In these cases, a post-employment letter can only be provided once this information is received.

In order to reflect the intent of section 32 and to ensure appropriate timely advice to departing public office holders, I recommend that departing public office holders have an obligation to advise the Commissioner of their upcoming departures as soon as the departure date is determined.

RECOMMENDATION 4-21

That section 32 be amended to require a departing public office holder to inform the Commissioner of his or her departure as soon as the departure date is determined.

RECOMMENDATIONS RELATING TO NON-REPORTING PUBLIC OFFICE HOLDERS

As mentioned in Chapter 1 in relation to non-reporting public office holders, I am of the view that non-reporting public office holders should be subject to the same disclosure and similar public reporting requirements in relation to outside activities, recusals and gifts and other advantages as apply to reporting public office holders (Recommendation 1-1).

Outside activities

As mentioned earlier in this chapter, section 22 requires reporting public office holders to make extensive confidential disclosures to the Commissioner within 60 days after appointment. The information to be disclosed to the Commissioner with respect to outside activities is described in paragraph 22(2)(*d*). The relevant part of subsection 22(2) reads as follows:

> ***22.*** *(2) The report required under subsection (1) must contain the following:*
>
> […]
>
> (*d*) *a description of all activities referred to in section 15 in which the reporting public office holder was engaged in the two-year period before the day of appointment;*
>
> […]

This requirement should be extended to include non-reporting public office holders.

RECOMMENDATION 4-22

That paragraph 22(2)(d) of the Act be amended to extend to non-reporting public office holders the requirement to disclose to the Commissioner a description of outside activities referred to in subsection 15(1).

Any material change to the information disclosed in relation to outside activities should also be disclosed by non-reporting public office holders under the same conditions as apply to reporting public office holders.

RECOMMENDATION 4-23

That subsection 22(5) of the Act be amended to require non-reporting public office holders to disclose to the Commissioner material changes in relation to outside activities referred to in subsection 15(1).

Subsection 25(4) requires that reporting public office holders publicly report outside activities in which they engage by exception under subsections 15(2) and (3). Non-reporting public office holders are permitted to engage in any of the outside activities referred to in subsection 15(1) as long as no other provision of the Act is contravened in doing so. I believe it is appropriate, for transparency reasons, that these activities also be publicly reported.

RECOMMENDATION 4-24

That section 25 of the Act be amended to require that a public declaration be made in relation to all outside activities referred to in subsection 15(1) engaged in by non-reporting public office holders.

Recusals

One of the most important obligations that the Act places on all public office holders, including non-reporting public office holders, is the duty, set out in section 21, to recuse themselves from any discussion, decision, debate or vote on any matter in respect of which they would be in a conflict of interest. While reporting public office holders are required under subsection 25(1) to disclose recusals to the Commissioner for public examination, this is not the case for non-reporting public office holders. It should be.

RECOMMENDATION 4-25

That subsection 25(1) be amended to require that non-reporting public office holders, as well as reporting public office holders, disclose any recusal to the Commissioner within 60 days of the recusal taking place and that a public declaration be made.

Gifts

Section 23 requires that reporting public office holders disclose all gifts or other advantages accepted by them if they exceed $200 in value. I have recommended that this threshold be significantly lowered (Recommendation 4-8.) I believe that non-reporting public office holders should be subject to the same requirement. This would require a minimal amendment to section 23 to refer to all public office holders in relation to gifts.

RECOMMENDATION 4-26

That section 23 of the Act, relating to the disclosure to the Commissioner of gifts or other advantages, be amended to apply to all public office holders.

Subsection 25(5) requires that reporting public office holders make a public declaration of these gifts or other advantages. Again, non-reporting public office holders are not included. They should be, except that only those gifts or advantages that relate to their position as a public office holder should be publicly declared.

RECOMMENDATION 4-27

That subsection 25(5), relating to the public declaration of gifts or other advantages, be extended to apply to all public office holders, where the gifts or other advantages relate to their duties as public office holders.

CHAPTER 5: POST-EMPLOYMENT – PART 3 (SECTIONS 33 – 38)

GENERAL OBSERVATIONS

The post-employment rules, which are set out in Part 3 of the *Conflict of Interest Act* (Act), aim to protect the public interest by preventing former public office holders from taking improper advantage of their previous public office.

I note that the *Lobbying Act*, administered by the Lobbying Commissioner, establishes a separate post-employment rule, namely a five-year prohibition on lobbying, directed at various classes of individuals, including many of the reporting public office holders covered by the *Conflict of Interest Act*.

Generally, the post-employment rules in the *Conflict of Interest Act* are appropriate and I see no reason to propose significant amendments to the rules as set out in sections 33 to 37. However, I am concerned about the lack of reporting obligations for reporting public office holders after they have left office.

The Act's post-employment rules received much public attention as a result of the Oliphant Commission in 2010 (*Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney*). I participated as an expert witness in a panel at that Commission. Some of my recommendations in this chapter support those made by the Oliphant Commission.

POST-EMPLOYMENT RULES

The general post-employment prohibitions in sections 33 and 34 apply to all former public office holders for an indefinite period. The remaining provisions of Part 3 apply only to former reporting public office holders during a limited cooling-off period.

Taking improper advantage of previous public office

Section 33 establishes a broadly-worded prohibition against taking improper advantage of a previous public office. It reads as follows:

> ***33.*** *No former public office holder shall act in such a manner as to take improper advantage of his or her previous public office.*

The most obvious examples of "improper advantage" are set out in sections 34 and 35, which are discussed below. It would be virtually impossible to foresee all possible situations that might be considered improper. Whether or not certain conduct amounts to taking improper advantage is very fact-specific, necessitating a review of the particular circumstances of any given situation.

I do not recommend any change to this section.

Switching sides and using insider information

Former public office holders may not "switch sides", that is, act for or on behalf of any person or organization in specific matters in which they previously acted for or provided advice to the federal government. They are also prohibited from providing advice to any person or organization using information obtained while in public office that is not available to the public.

Subsections 34(1) and (2) read as follows:

> ***34.*** *(1) No former public office holder shall act for or on behalf of any person or organization in connection with any specific proceeding, transaction, negotiation or case to which the Crown is a party and with respect to which the former public office holder had acted for, or provided advice to, the Crown.*
>
> *(2) No former public office holder shall give advice to his or her client, business associate or employer using information that was obtained in his or her capacity as a public office holder and is not available to the public*.

This section has been applied without any difficulty. I do not recommend any amendments.

Additional rules for reporting public office holders

Section 35 applies only to former reporting public office holders and applies for the duration of a one- or two-year "cooling-off period" established by section 36. During this period a former reporting public office holder is subject to the following restrictions:

> ***35.*** *(1) No former reporting public office holder shall enter into a contract of service with, accept an appointment to a board of directors of, or accept an offer of employment with, an entity with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office.*
>
> *(2) No former reporting public office holder shall make representations whether for remuneration or not, for or on behalf of any other person or entity to any department, organization, board, commission or tribunal with which he or she had direct and significant official dealings during the period of one year immediately before his or her last day in office.*

(3) No former reporting public office holder who was a minister of the Crown or minister of state shall make representations to a current minister of the Crown or minister of state who was a minister of the Crown or a minister of state at the same time as the former reporting public office holder.

Both subsections 35(1) and (2) refer to "direct and significant official dealings". My Office is frequently consulted on the application of these words to particular situations and I have issued an interpretation bulletin in relation to "direct", "significant" and "official" explaining the application of these terms to individual situations. The terms are themselves clear. For this reason, I don't believe these terms need to be defined and do not recommend that they be defined in the Act.

In order for the prohibition in subsection 35(1) to apply, a former reporting public office holder must have had a direct and significant official dealing "with" the entity seeking to hire the former reporting public office holder. A former reporting public office holder who has worked on an issue "in relation to" that entity but not directly "with" the entity would not be caught by this prohibition. In my view, both situations should be prohibited.

RECOMMENDATION 5-1

That the prohibition in subsection 35(1) be expanded to include direct and significant official dealings that a reporting public office holder had during his or her last year in office, not only "with" entities, but also "in relation to" entities.

As discussed and recommended in Chapter 3 in relation to section 10 (Recommendation 3-5) and in Chapter 4 in relation to section 24 (Recommendation 4-9), I am recommending that a reference to partnership relationships be added to subsection 35(1) as well as to sections 10 and 24.

RECOMMENDATION 5-2

That subsection 35(1) be amended to include partnership relationships as well as contracts of service, appointments to boards of directors and employment.

The prohibitions under subsections 35(1) and (2) apply to direct relationships between reporting public office holders and entities with which they have had direct and significant official dealings in their last year in office. Often, former reporting public office holders work with firms who have as clients, entities that had direct and significant official dealings with the former reporting public office holder.

The prohibition under subsection 35(1) would not include services provided indirectly by a reporting public office holder through an intermediary, the firm or a colleague, to the entity with which the reporting public office holder had direct and significant official dealings. Similarly, the prohibition under subsection 35(2) would not include representations made by a third party or a colleague, on behalf of a former reporting public office holder, to an entity with which the former reporting public office holder had direct and significant official dealings.

In keeping with the spirit of the Act and in order to avoid unfair advantage being taken by hiring former reporting public office holders, I recommend that subsections 35(1) and (2) be amended to ensure that former reporting public office holders do not indirectly engage in any activity that they would otherwise be prohibited from doing directly.

RECOMMENDATION 5-3

That subsections 35(1) and (2) be amended to prohibit former reporting public office holders from participating indirectly in any of the activities that are directly prohibited by those subsections.

As I have noted before in my annual reports, I have encountered two situations where the strict application of the prohibitions in section 35 simply does not make sense. I have therefore not applied the section to those situations.

Specifically, I have not interpreted section 35 as preventing former reporting public office holders from taking up new positions within the federal public sector. To do otherwise would not be in the public interest and would have the effect of significantly limiting mobility within the federal public sector. In those rare cases where a regulatory relationship might exist between the old and new positions, my Office has reviewed the duties and functions of the new position and has on occasion put in place a conflict of interest screen to avoid situations that may raise concerns in relation to post-employment rules, such as switching sides as prohibited by section 34.

Nor have I interpreted this provision to prohibit former ministerial staff from working for a political party during their cooling-off period, even though they probably have had direct and significant official dealings with that party while employed in a minister's office. It is likely that ministerial staff will have close ties with their political party while employed as ministerial staff and may have been recruited with that in mind.

RECOMMENDATION 5-4

That the Act be amended to reflect exceptions from the general rules in section 35 to allow for movement within the federal public sector and from a minister's office to the office of a political party.

"Cooling-off periods"

Section 36 of the Act establishes the length of "cooling-off periods" for the purpose of section 35. The cooling-off period is two years for former ministers of the Crown and ministers of state and one year for all other former reporting public office holders.

These periods as set out are clear and I have no recommendations to make in relation to them.

Reporting interactions with government officials

During the "cooling-off period", a former reporting public office holder is required under section 37 of the Act to report to the Commissioner any of the activities that are referred to in paragraph 5(1)(*a*) or (*b*) of the *Lobbying Act*.

Subsection 37(1) of the *Conflict of Interest Act* reads as follows:

> ***37.*** *(1) A former reporting public office holder who, during the applicable period under section 36, has any communication referred to in paragraph 5(1)(a) of the* Lobbying Act *or arranges a meeting referred to in paragraph 5(1)(b) of that Act shall report that communication or meeting to the Commissioner.*

The introductory words of subsection 5(1) and paragraphs 5(1)(*a*) and (*b*) of the *Lobbying Act* read as follows:

> ***5.*** *(1) An individual shall file with the Commissioner, in the prescribed form and manner, a return setting out the information referred to in subsection (2), if the individual, for payment, on behalf of any person or organization (in this section referred to as the "client"), undertakes to*
>
> *(a) communicate with a public office holder in respect of*
>
> *(i) the development of any legislative proposal by the Government of Canada or by a member of the Senate or the House of Commons,*
>
> *(ii) the introduction of any Bill or resolution in either House of Parliament or the passage, defeat or amendment of any Bill or resolution that is before either House of Parliament,*
>
> *(iii) the making or amendment of any regulation as defined in subsection 2(1) of the* Statutory Instruments Act*,*
>
> *(iv) the development or amendment of any policy or program of the Government of Canada,*
>
> *(v) the awarding of any grant, contribution or other financial benefit by or on behalf of Her Majesty in right of Canada, or*

(vi) the awarding of any contract by or on behalf of Her Majesty in right of Canada; or

(b) arrange a meeting between a public office holder and any other person.

The introductory words of subsection 5(1) of the *Lobbying Act* limit that section to instances where payment is involved and where the activities are on behalf of a person or organization. However, the limitations in these introductory words of the *Lobbying Act* are not carried forward into the *Conflict of Interest Act*.

It is instructive to note that my Office has only received one report under section 37. The provision is obviously not well understood. This situation could be improved by listing the activities intended to be covered rather than referring reporting public office holders to the *Lobbying Act*. I would also recommend that there be a short deadline imposed for such reporting, such as seven days.

RECOMMENDATION 5-5

That the reference to paragraphs 5(1)(a) and (b) of the Lobbying Act *in section 37 be replaced by a list of the activities that are intended to be covered and that a deadline of seven days be added to report such activities.*

Adding post-employment reporting obligations

As I indicated at the outset of this chapter, the current post-employment rules would generally appear to be appropriate, but the absence of reporting obligations makes it difficult to enforce the rules. Except for section 37, public office holders have no obligation to report on any of their post-employment activities after they have left public office.

Before leaving office, reporting public office holders are required to disclose to the Commissioner any firm offers of employment or acceptances of offers within a prescribed timeframe. I send a detailed letter to all public office holders when I am informed of their departure, reminding them of their post-employment obligations and inviting them to contact my Office for guidance. However, once they leave office, there are minimal obligations (only under section 37) to report any activity to my Office. In most cases, former reporting public office holders do not maintain contact with my Office during their cooling-off period.

The Act's post-employment provisions could be greatly strengthened by the introduction of new requirements with respect to reporting. In particular, I recommend that former reporting public office holders be required, during their cooling-off period, to report any firm offers relating to employment, a contract of service, an appointment to a board of directors or a partnership relationship within seven days of the offer. Including these additional

reporting requirements would provide the Commissioner with an opportunity to advise the individuals of their obligations and to assist them to avoid contravening the post-employment rules.

RECOMMENDATION 5-6

That the Act be amended to require former reporting public office holders to report any firm offers of a contract of service, an appointment to a board of directors, a partnership relationship or employment during their cooling-off period, within seven days of the offer.

In addition, I believe that there should be a requirement for former reporting public office holders to report on their specific duties and responsibilities during their cooling-off periods. Reports should include detailed information on their professional activities, a description of their specific duties and responsibilities, and information on any measures taken in the host organization to ensure compliance with the Act. These reports should be filed on a quarterly basis.

RECOMMENDATION 5-7

That the Act be amended to require former reporting public office holders to report on their duties and responsibilities in relation to their new contracts of service, appointments to a board of directors, partnership relationships or employment during their cooling-off period, including a description of their duties and responsibilities and information on any measures taken to ensure compliance with the Act. A deadline of 30 days from the start date of their new position would also be required.

I recommend in Chapter 6 (Recommendation 6-12) that a former reporting public office holder who fails to meet any reporting deadlines for post-employment matters be subject to an administrative monetary penalty consistent with other situations where reporting obligations are not met in the Act.

Exemptions and waivers

Section 38 gives the Commissioner the authority, on application by a former member of ministerial staff, to exempt that member from section 35 or 37. Section 39 authorizes the Commissioner, on application by any reporting public office holder, to waive or reduce the length of the cooling-off period established under section 36. These exemptions, waivers or reductions are not often requested and, when they are requested, they are granted only exceptionally based on individual circumstances. The Act sets out a number of factors to be considered in deciding whether to grant the request.

I do not recommend any changes to section 38 or 39.

CHAPTER 6: ADMINISTRATION AND ENFORCEMENT – PART 4 (SECTIONS 43 – 62)

Part 4 of the Act covers several somewhat discrete subjects, all of which are included in this chapter. They are discussed in this chapter under the headings Advisory Mandate, Examinations, Public Registry and Administrative Monetary Penalties following the order of the subjects covered in Part 4. I conclude the chapter with a short discussion about two matters not covered in the Act, under the headings Retention Period for Records and Audit Functions.

ADVISORY MANDATE

Confidential advice – Section 43

Section 43 sets out the requirement that the Commissioner provide confidential advice to the Prime Minister and to individual public office holders. As I have already highlighted in Chapter 4, the provision of confidential advice, particularly to individual public office holders under paragraph 43(*b*), is a fundamental part of the work of my Office.

Section 43 provides as follows:

> ***43.*** *In addition to carrying out his or her other duties and functions under this Act, the Commissioner shall*
>
> *(a) provide confidential advice to the Prime Minister, including on the request of the Prime Minister, with respect to the application of this Act to individual public office holders; and*
> *(b) provide confidential advice to individual public office holders with respect to their obligations under this Act.*

Paragraph 43(a)

Under paragraph 43(*a*), the Commissioner is required to provide confidential advice to the Prime Minister, whether to respond to requests from the Prime Minister or to notify him or her of a situation that the Commissioner determines should be brought to his attention. This is clear and I have no recommendations to make in relation to this paragraph.

Paragraph 43(b)

It is essential that the advice provided to public office holders under paragraph 43*(b)* be confidential. This encourages accurate and full communication from public office holders to my Office and enables me and my staff to provide advice that is complete and appropriate.

As I have stated on many occasions, I consider prevention of conflicts of interest to be a primary aspect of the work of my Office.

My Office communicates with all public office holders once it is notified of their appointments to remind them of their obligations under the Act. In the case of reporting public office holders, my Office also provides them with the necessary disclosure forms. Advisors work with reporting public office holders to answer any questions they may have about how the Act may apply to their personal situation, and to assist them in completing the initial compliance process. This is carried out through correspondence, telephone conversations and face-to-face meetings as needed.

This is a clear and essential paragraph of the Act and I have no recommendations for changes to it.

Mandatory training

My Office has adopted the practice of offering presentations to ministers' offices, agencies, boards and tribunals, and other communities of public office holders. We offer annual presentations to party caucuses, whose members may be subject to both the Act and the *Conflict of Interest Code for Members of the House of Commons* (Members' Code). We issue advisories and guidelines under the Act on specific issues where we see a general need for advice. Finally, we make information readily accessible online, including information notices and backgrounders.

Despite these efforts, public office holders are not always fully conversant with the Act and their obligations in relation to it. In some cases, they rely on individuals outside my Office to obtain information on the Act, and, in doing so, miss the opportunity to get direct information from my Office about the rules that apply to them.

Unlike the Members' Code, which expressly requires the Commissioner to undertake educational activities for Members, the Act does not set out any training requirements for public office holders. While many public office holders seek advice from my Office, they are not required to do so.

I believe that public office holders could benefit from a mandatory requirement to participate in some form of initial training to better understand how the Act applies to their personal situations. This requirement should be completed within a reasonable period after their appointment. An interactive session to review public office holders' obligations under the Act would help to reinforce their knowledge and understanding of the Act and to keep their obligations in mind. The training could be provided on an individual basis, as part of a targeted presentation to the organization to which they belong or at a regularly scheduled presentation by my Office for any interested public office holder.

Although not available at this time, interactive materials could also be created to be utilized online through the Office's website. This would be useful for all public office holders and even for those who are considering a position in public office.

RECOMMENDATION 6-1

That the Act be amended to include a requirement for all public office holders to participate in a training session on the Act within a reasonable period after their appointment.

EXAMINATIONS – SECTIONS 44 - 50

Initiating Examinations

There are two ways in which examinations can be initiated under the Act.

Under section 44, Senators and Members of the House of Commons may request an examination. If the minimal requirements in formulating the requests are met, the Commissioner must proceed with the examination and issue a public report on his or her findings.

Subsections 44(1) and (2) read as follows:

> ***44.*** *(1) A member of the Senate or House of Commons who has reasonable grounds to believe that a public office holder or former public office holder has contravened this Act may, in writing, request that the Commissioner examine the matter.*
>
> *(2) The request shall identify the provisions of the Act alleged to have been contravened and set out the reasonable grounds for the belief that the contravention has occurred.*

Under section 45 the Commissioner may undertake an examination on his or her own initiative. I have done so as a result of information that comes to my attention in a variety of ways, perhaps through media reports, from information received from members of the public or as a result of reviews initiated by my Office. Once an examination has been commenced under section 45, the Commissioner must issue a public report unless he or she, having regard to all the circumstances, chooses to discontinue the examination, in which case there is no requirement to issue a report.

Subsection 45 (1) reads as follows:

> ***45.*** *(1) If the Commissioner has reason to believe that a public office holder or former public office holder has contravened this Act, the Commissioner may examine the matter on his or her own initiative.*

I have no concerns with respect to section 45, which sets out my powers to self-initiate an examination. However, I do have some comments on section 44.

Section 44

Preliminary Review

On receiving a written request from a member of the Senate or the House of Commons that meets the requirements set out in section 44, the Commissioner must launch an examination.

Unlike the Members' Code, the Act does not provide for a preliminary period during which the Commissioner may consider the matter and seek preliminary information before making a decision as to whether an examination is warranted. Section 27 of the Members' Code requires that the Commissioner forward without delay a copy of any request received from a Member of the House of Commons that meets the requirements of the Members' Code to the Member against whom the allegations are made, and afford that Member 30 days to respond.

On receipt of the Member's response, the Commissioner has another 15 working days to conduct a preliminary review of the request and the response to determine if an inquiry is warranted. The benefit of this approach is that it affords the Commissioner the opportunity to carry out some preliminary fact-finding in order to determine whether an inquiry is warranted.

Consideration should be given to amending section 44 of the Act to include a provision, generally along the lines of the one in the Members' Code, that would establish a process to allow for the Commissioner to undertake a preliminary review before an examination is commenced. This would provide an opportunity to the subject of the request to make representations on the allegations to the Commissioner before the Commissioner makes a decision as to whether an examination is warranted.

RECOMMENDATION 6-2

That the Act be amended to provide for a process that would allow for the Commissioner to undertake a preliminary review of a request for an examination, including any response from the subject of the request, before the Commissioner determines whether an examination is warranted.

Public comment

In the context of examinations, I am bound by the confidentiality obligations set out in subsection 48(5). With this in mind, when it comes to public comment, I follow the rule set out in subsection 27(5.1) of the *Conflict of Interest Code for Members of the House of Commons*, which reads as follows:

> ***27.*** *(5.1) Other than to confirm that a request for an inquiry has been received, or that a preliminary review or inquiry has commenced, or been completed, the Commissioner shall make no public comments relating to any preliminary review or inquiry.*

My practice is to refrain from making any public comments about an ongoing examination under the Act other than to confirm or deny that an examination has been commenced. This serves to respect procedural fairness. It also respects the spirit of the Act and harmonizes the procedures under the Act and the Members' Code, as well as ensures consistency in the administration of both investigative regimes.

Challenges are created, however, when a Senator or Member makes public statements about an examination that he or she has requested or other allegations raised in the public domain. On several occasions, these statements have included misinformation. There have also been situations when the subject of an allegation has inaccurately claimed that he or she had already raised the matter with my Office in the past and been told that there were no ethical concerns related to it.

If the requirements of section 44 have been met and I proceed to an examination in relation to a request, my report will be made public and I can use that opportunity to correct any misinformation. I do believe, however, that there should be some room to comment further in certain other circumstances, a belief I have also expressed in relation to inquiries under the Members' Code.

The Commissioner should have an opportunity to correct the public record in cases where he or she does not conduct an examination or issue a report. The Commissioner should also have an opportunity to explain his or her reasons for not pursuing a matter raised in the public domain where no examination is launched. If I do not comment publicly in relation to misinformation, this could have an unfair deleterious effect on the reputation of the person who was the subject of a request or the person who requested it and my Office.

RECOMMENDATION 6-3

That the Commissioner be expressly permitted to comment publicly to correct misinformation, or to explain his or her reasons for not pursuing a matter that has been raised in the public domain, where doing so is in the public interest or serves to clarify the mandate of the Office.

A related issue is the extent to which Senators or Members of the House of Commons should be permitted to comment publicly on requests for examinations that they have made under the Act. I have requested that Senators and Members of the House of Commons who make a request refrain from public comment until I have confirmed that I have received the request and have notified the person who is the subject of that request. I believe that this is fair and appropriate, and does not inhibit the parliamentarian or the public office holder from making any public comment once those steps have been followed.

RECOMMENDATION 6-4

That the Act be amended to require that a Senator or Member of the House of Commons requesting an examination refrain from commenting publicly on the request until the Commissioner has confirmed that he or she has received the request and has notified the person who is the subject of that request.

Section 68 referrals from the Public Sector Integrity Commissioner

Under section 68 of the Act, the Public Sector Integrity Commissioner may refer a matter to the Conflict of Interest and Ethics Commissioner who, whether or not he or she launches an examination based on the information contained in the referral, must issue a public report on the matter.

Section 68 reads as follows:

> ***68.*** *If a matter is referred to the Commissioner under subsection 24(2.1) of the* Public Servants Disclosure Protection Act, *the Commissioner shall*
>
> *(a) provide the Prime Minister with a report setting out the facts in question as well as the Commissioner's analysis and conclusions;*
> *(b) provide a copy of the report to the public office holder or former public office holder who is the subject of the report;*
> *(c) provide a copy of the report to the Public Sector Integrity Commissioner; and*
> *(d) make the report available to the public.*

Matters are referred to me from many sources. I treat all of these seriously with a view to ensuring that appropriate cases are looked into. It is unclear why the matters referred by the Public Sector Integrity Commissioner, alone, should require that a report be issued regardless of whether an examination is warranted.

In my view, section 68 should simply be repealed. Anything referred to the Commissioner by the Public Sector Integrity Commissioner should be considered under section 45 of the Act in the same way as requests from the general public or from any other agent or officer of Parliament or reports of the media are considered. I have been following this practice. At a minimum, section 68 should be amended to require that the Commissioner have reason to believe a contravention has occurred before an examination is commenced, as is now the case under section 45, and to provide that no report is necessary where an examination is not warranted.

RECOMMENDATION 6-5

That section 68 of the Act be repealed.

Access to documents

My Office has in the past encountered significant delays in obtaining access to Cabinet documents (confidences of the Privy Council) that were necessary to complete an examination under the Act. It is evident that Cabinet documents could be relevant in examinations, particularly those relating to ministers, parliamentary secretaries and deputy ministers. Furthermore, both subsection 90(1) of the *Parliament of Canada Act* and section 51 of the *Conflict of Interest Act* anticipate that I may refer to information in Cabinet documents, which presupposes that I will have access to them.

I have also experienced difficulty in the past in obtaining documents from the House of Commons. In one inquiry conducted under the Members' Code, I was unable to obtain direct access to documents stored electronically on the server of the House of Commons that were necessary to conduct my investigation. Instead, the documents were given to the Member to review and vet to determine relevance. This left me unsure as to whether I had received all the relevant documents. It is quite possible that I will also require direct access to documents under the control of the House of Commons in a timely manner in relation to an examination under the Act.

It must be clearly understood that the Commissioner has the authority to access any document needed to conduct his or her investigations. Moreover, these documents must be provided directly to the Commissioner and not vetted by another party, so as not to compromise the integrity of the investigative process.

RECOMMENDATION 6-6

That the Act be amended to ensure that the Commissioner is given direct and timely access to any document requested in the course of conducting an examination under the Conflict of Interest Act*, including Cabinet confidences and documents in the possession of the House of Commons.*

Enforcement of Summons and Orders

Section 48 of the Act establishes the powers of the Commissioner to compel the attendance of witnesses or the production of evidence. To date, I have not had to issue a summons under the Act, because participants in the examination process have generally been cooperative. However, it could become necessary to issue a summons in the future.

Subsection 48(2) gives the Commissioner the powers of a court of record in civil cases to enforce attendance of witnesses or to compel them to give evidence. It does not, however, appear to give the Commissioner the jurisdiction to deal with a situation where a witness ignores a summons or refuses to appear or produce documents, conduct which would amount to contempt of the examination procedures provided for in the Act.

Only superior courts or those bodies given specific legislative authority have jurisdiction to deal with such forms of contempt. No such authority appears to be conferred upon the Commissioner by section 48.

In this connection, it is worth noting that other federal administrative bodies have been granted statutory authority to certify their mandatory orders following which they are deemed to be orders of the Federal Court for the purposes of enforcement. Once certified, these orders can be enforced in the same manner as an order of the Federal Court. Any subsequent failures to observe the terms of a certified order would be subject to the contempt process of the Federal Court and dealt with accordingly.

The Office of the Conflict of Interest and Ethics Commissioner does not have recourse to a comparable mechanism to enforce its mandatory orders, which include summons issued under subsection 48(1) as well as any compliance orders made pursuant to section 30. Section 30 compliance orders are discussed in Chapter 4.

I would therefore recommend that Part 5 of the Act be amended to provide a mechanism allowing for the enforcement in Federal Court of any summons or compliance order issued by the Commissioner.

RECOMMENDATION 6-7

That Part 5 be amended to include a provision allowing for certification of a summons or compliance order issued by the Commissioner that would be enforceable by the Federal Court.

Suspending Examinations

Under section 49 of the Act the Commissioner must suspend an examination in certain situations where an offence may have occurred under another Act in relation to the same subject-matter as is being examined by his or her Office. There have not been many occasions in which section 49 has been engaged.

I do not recommend any amendment to this section.

Effect of Previous Advice on Examination Request

The conflict of interest regimes in the majority of the provincial or territorial jurisdictions provide that investigations cannot be pursued when commissioners have given previous written advice in relation to the same subject matter as the investigation request. This is, of course, conditional on the public office holders having provided all relevant material facts in seeking that advice. This is a useful provision and should be included in the Act.

RECOMMENDATION 6-8

That the Act be amended to provide that no examination can be initiated in relation to any activity in respect of which written advice was provided by the Commissioner unless new information relating to that activity is brought to the attention of the Commissioner.

PUBLIC REGISTRY – SECTION 51

Public reporting is a very important component of the Act. It provides transparency and accountability. In my opinion it is fundamental to any effective conflict of interest regime.

Section 51 requires that my Office maintain a public registry and list the documents that are to be made available for examination by the public.

Paragraph 51(1)(*e*) also provides discretion to the Commissioner to make any document public if he or she considers it appropriate to do so. I have used this authority mainly in relation to sections 29 and 30. Under section 29, the Commissioner works in cooperation with public office holders to establish appropriate compliance measures to assist them to meet their obligations. Under section 30, the Commissioner can issue an order to direct a public office holder to take any compliance measure in respect of any matter. In the interest of transparency and to encourage ongoing compliance with the Act, I make most measures under section 29 and all orders under section 30 public.

Summary statements, signed within 120 days of the appointment of reporting public office holders, are publicly declared under paragraph 51(1)(*b*). These summary statements include compliance orders issued within the 120-day period. However, there is no requirement that other compliance orders be made public. I would recommend that the Act be amended to provide that all compliance orders be publicly declared.

RECOMMENDATION 6-9

That subsection 51(1) be amended to require that all compliance orders issued under section 30 be publicly declared.

I have noted in Chapter 4 that the timelines for public declarations in section 25 are misleading, and recommended (Recommendation 4-10) that section 25 be amended to require that the appropriate deadlines apply to disclosures to the Commissioner rather than to the public declarations, which are prepared in the Commissioner's Office. The Office would make these disclosures public under paragraph 51(1)(*a*) as soon as possible. As a consequence of the recommendation to amend section 25, if it is accepted, an amendment would be required to paragraph 51(1)(*a*) to refer to the disclosures made under section 25.

RECOMMENDATION 6-10

That, if Recommendation 4-10 is accepted, an amendment be made to paragraph 51(1)(a) to refer to disclosures made under section 25 rather than public declarations made under that section.

ADMINISTRATIVE MONETARY PENALTIES – SECTIONS 52 - 62

Section 52 provides that, if the Commissioner believes on reasonable grounds that a public office holder has contravened any of the provisions listed in that section, he or she may impose an administrative monetary penalty not exceeding $500. Penalties are issued in accordance with a prescribed process that respects the principles of procedural fairness. They are made public, ensuring that the system is clear and transparent. These penalties apply to failures to meet deadlines or to provide required information or documentation. There are no penalties for truly substantive contraventions, which would usually be more serious.

Annual Review Reporting Requirements

As discussed in Chapter 4, I am recommending that section 28 of the Act be amended to establish a deadline for the completion of the annual review process (Recommendation 4-20). A failure to meet this new obligation should be subject to an administrative monetary penalty.

RECOMMENDATION 6-11

That, if Recommendation 4-20 is accepted, section 52 be amended to provide that a failure to meet the deadline for completing an annual review be subject to an administrative monetary penalty.

Post-Employment Reporting Requirements

I have recommended in Chapter 5 that there be some reporting requirements for former reporting public office holders and reporting deadlines established (Recommendations 5-5 to 5-7). It would also be appropriate to provide for administrative monetary penalties for failure to meet these reporting deadlines.

RECOMMENDATION 6-12

That the Act be amended to extend the administrative monetary penalty regime to apply during post-employment to cover failures to meet reporting deadlines.

Administrative Monetary Penalties for Substantive Breaches

In my 2010-11 Annual Report under the Act, I discussed the options available to me where substantive obligations under the Act are not met. In instances where the facts of a situation and the interpretation of the Act are clear, an examination would in most cases not be warranted. Consideration should be given to amending the Act to provide expressly for a process to deal with substantive contraventions that do not warrant a full examination. An

administrative monetary penalty regime, with its associated processes for notices of violation and notices of decision, could apply to these substantive contraventions.

I believe penalties for substantive contraventions of the Act should be considered where they do not warrant a full examination because it is clear that a contravention has occurred. The clearest cases of contraventions would likely emerge in relation to the acceptance of a gift that does not meet the acceptability test (section 11), engaging in a prohibited outside activity (section 15), holding controlled assets (section 17) and failures to recuse (section 21). The maximum penalties in these cases could be higher than the existing $500 limit.

The extension of the administrative monetary penalty regime in this way to include certain substantive contraventions would, as for the current regime, result in a public report of a contravention even where an examination is not warranted.

I note that sections 11 and 21 apply to all public office holders. Currently, administrative monetary penalties only apply to reporting public office holders. This recommendation would result in non-reporting public office holders being subject to administrative monetary penalties.

RECOMMENDATION 6-13

That section 52 be amended to provide for penalties for substantive contraventions of the Act where an examination is not warranted because it is clear that a contravention has occurred. These could be applied, for example, in relation to gifts (section 11), prohibited activities (section 15), holding controlled assets (section 17) and failures to recuse (section 21). Penalties relating to sections 11 and 21 should apply to non-reporting public office holders as well as reporting public office holders.

Penalties Following an Examination Report Finding a Contravention

Suggestions have also been made that public office holders should be subject to a monetary penalty if they are found, pursuant to an examination under the Act, to have contravened the Act.

I am of the view that a public report finding that a public office holder has contravened the Act is, in and of itself, a significant consequence for the public office holder concerned. However, consideration could be given as to whether it would be desirable to impose a penalty in these cases as well.

RECOMMENDATION 6-14

That consideration be given as to whether it would be desirable to impose a penalty where an examination results in the finding of a contravention.

RETENTION PERIOD FOR RECORDS

Unlike the Member's Code, the Act is silent on retention periods for information collected by the Office as a result of disclosure obligations of public office holders. The practice implemented internally is to keep records for 10 years from the date of departure of public office holders or, in the case of reporting public office holders, 10 years from the end of the post-employment cooling-off period under section 35 of the Act. This decision takes into consideration the fact that I can launch an investigation within 5 years from the time I become aware of an issue, but not later than 10 years after the day on which the subject-matter of the proceeding arose.

I would recommend that the Act expressly provide for a retention period as described above. This would ensure consistency in the practices followed for the retention and disposition of information provided by public office holders.

RECOMMENDATION 6-15

That the Act be amended to provide for a retention period for information collected by the Office of 10 years following the last activity related to an individual's position as a public office holder, or, in the case of a reporting public office holder, 10 years following his or her cooling-off period.

AUDIT FUNCTIONS

Some have suggested that the Commissioner should be granted explicit audit functions under the Act. With respect to this suggestion, I note that the Act does give the Commissioner broad powers to review the personal affairs of reporting public office holders and to conduct examinations into the conduct of any public office holder.

When reporting public office holders are appointed, they must complete a confidential report disclosing to my Office their assets, liabilities, sources of income and outside activities. In addition, they are required to disclose any information that the Commissioner considers necessary to ensure that they are in compliance with the Act. They are required to update this information each year to ensure it continues to be complete and accurate.

In cases where the Commissioner has reason to believe that there has been a contravention of the Act, he or she may launch an examination, during which the Commissioner has the authority to summon witnesses and require them to give evidence on oath and to produce relevant documents or other materials.

I have recommended several amendments to specific provisions of the Act related to the powers described above. I do not, however, believe that additional audit functions are necessary in order for the Commissioner to meet the objectives of the Act.

I therefore do not recommend any amendment in this regard.

CHAPTER 7: CONCLUSION

As I noted at the beginning of this submission, it is my belief that the *Conflict of Interest Act* (Act), at its core, is a useful tool. It seeks to prevent conflicts between public and private interests. In this submission, I have provided recommendations that I believe will, if adopted, clarify and strengthen the Act. While I have made a number of recommendations, some more substantive and others more technical in nature, there are several that I believe to be a priority.

In particular, I draw attention to the need to increase transparency around the acceptance of gifts and other advantages through increased disclosure and public declaration.

Public office holders who leave their positions should have reporting obligations during their cooling-off period to ensure they continue to meet their post-employment obligations.

As well, the prohibitions against holding controlled assets and pursuing outside activities are, I believe, overbroad and should be balanced in relation to a public office holder's official duties and responsibilities.

There should be some disclosure and reporting obligations for non-reporting public office holders to assist them in keeping their obligations under the Act in mind.

The Commissioner should be given express authority to comment publicly to correct misinformation relating to investigative work that is in the public domain, where doing so is in the public interest or serves to clarify the mandate of the Office.

Some substantive contraventions of the Act should be subject to administrative monetary penalties.

Finally, the language and processes of the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons* should be harmonized where possible.

An effective conflict of interest regime must have clear and practical rules that are applied in a fair and consistent manner. It is important to ensure that public office holders understand their obligations and have the tools to support them in adhering to the rules of the Act. The paramount goal of the regime is, of course, to serve the public interest. This is best done by preventing conflicts of interest from arising through clear rules and common sense compliance measures; by treating contraventions when they occur with firm but fair consequences; and by ensuring that the regime is administered in a transparent, efficient and cost-effective way.

It is my hope that the Committee will find my recommendations useful as it undertakes its study of the Act. I remain available and pleased to discuss this submission and any other matter related to the Act at the convenience of the Committee.

List of Recommendations

Chapter 1: Introduction and General Observations

Recommendation 1-1: That the Act be amended to establish certain disclosure and public reporting requirements for non-reporting public office holders in relation to outside activities, recusals and gifts or other advantages. See also Recommendations 4-22 to 4-27.

Recommendation 1-2: That Parliament take steps to harmonize the *Conflict of Interest Act* and the *Conflict of Interest Code for Members of the House of Commons* to provide consistency in their language and processes, where appropriate.

Chapter 2: Purpose Clause and Definitions

Recommendation 2-1: That paragraph 3(*a*) of the Act be amended to reflect the overarching objective for the Act along the following lines:

3. The purpose of this Act is to

a) establish clear conflict of interest and post-employment rules for public office holder in order to maintain and enhance public confidence and trust in the integrity of public office holders as well as confidence in the objectivity and impartiality of the decision-making process in the government.

Recommendation 2-2: That the Act be amended to add a definition of "conflict of interest" in section 2, the interpretation section of the Act, based on the wording of the current section 4.

Recommendation 2-3: That the definition of "conflict of interest" be expanded to cover "entities" as well as "persons" as follows: "or to improperly further the private interest of another person or entity".

Recommendation 2-4: That the definition of ministerial staff be amended to make it clear either that the definition covers individuals working on behalf of the minister on contract or as volunteers, or that it is limited to individuals appointed under section 128 of the *Public Service Employment Act.*

Recommendation 2-5: That the definition of "ministerial adviser" be amended to remove the condition that they occupy a position in the office of a minister and to clarify who is intended to be included as a ministerial adviser.

Recommendation 2-6: That the Act be amended to list the agents of Parliament who are intended to be included in or excluded from the application of the Act.

Recommendation 2-7: That prothonotaries of the Federal Court be excluded from the definition of public office holder and the application of the Act.

Recommendation 2-8: That the *Conflict of Interest Act* expressly exempt from the definition of public office holder and the application of the Act members of the Canada-Newfoundland and Labrador Offshore Petroleum Board and the Canada-Nova Scotia Offshore Petroleum Board.

Recommendation 2-9: That the definition of "public office holder" expressly exclude individuals appointed by Governor in Council to perform a designated power on a part-time basis if they remain employees of the Public Service of Canada.

Recommendation 2-10: That the definition "public office holder" be broadened to include all individuals whose appointments are approved by the Governor in Council.

Recommendation 2-11: That the definition of "reporting public office holder" expressly exclude interns and summer students who are ministerial staff and have terms of less than six months. They would continue to meet the definition of "public office holder".

Recommendation 2-12: That the definition of "reporting public office holder" expressly exclude individuals appointed by Governor in Council in an acting capacity on a temporary basis for six months or less, or for a term of six months or less. They would continue to meet the definition of "public office holder".

Chapter 3: Rules of Conduct—Part 1 (Sections 4–19)

Recommendation 3-1: That a new general section 4 be included in Part 1 of the Act that would prohibit public office holders from exercising an official power, duty or function if they know or reasonably should know that they would be in a conflict of interest.

Recommendation 3-2: That section 7 be amended as follows:

- to remove the limiting words “based on the identity of the person or organization that represents the first-mentioned person or organization”; and
- to substitute the word “entity” for the word “organization”.

Recommendation 3-3: That the concluding words of section 8 be broadened to include a reference to improperly furthering or seeking to improperly further the private interests of an “entity” as well as a “person”.

Recommendation 3-4: That the concluding words of section 9 be broadened to include a reference to improperly furthering the private interests of an “entity” as well as a “person”.

Recommendation 3-5: That section 10 be amended to expressly include contracts of service, appointments to boards of directors and partnership relationships as well as employment relationships.

Recommendation 3-6: That section 11 include references to the other provisions relating to gifts, namely section 23 and subsection 25(5).

Recommendation 3-7: That the reporting requirements relating to travel on non-commercial aircraft under subsection 25(6) be referred to in section 12.

Recommendation 3-8: That the Commissioner be given the authority to permit reporting public office holders to engage in outside activities prohibited by subsection 15(1) where this would not be incompatible with the reporting public office holder’s public duties or obligations as a public office holder.

Recommendation 3-9: That section 15(3) be amended to include references to both concepts, “non-commercial character” and “not for profit”, in the French and English versions to describe the types of organizations referred to in subsection 15(3).

Recommendation 3-10: That a more stringent rule with respect to fundraising than the current one in section 16 be established for ministers and parliamentary secretaries.

Recommendation 3-11: That section 17 of the Act be amended to prohibit reporting public office holders who have a significant amount of decision-making power or access to privileged information, such as ministers, ministers of state, parliamentary secretaries, chiefs of staff and deputy ministers, from holding controlled assets, and to prohibit all other reporting public office holders from holding controlled assets only where to do so would place them in a conflict of interest.

Recommendation 3-12: That section 17 be amended to cover cases where controlled assets are held indirectly as well as directly.

Chapter 4: Compliance Measures—Part 2 (Sections 20–32)

Recommendation 4-1: That the definition of "exempt assets" in the English version of section 20 be amended to include the words "but not limited to" to make it clear that the list of examples is not exhaustive.

Recommendation 4-2: That paragraphs (*n*) and (*o*) be amended to exempt all moneys, whatever the amount, owed by relatives, whether or not under a mortgage or hypothec.

Recommendation 4-3: That the definition of "controlled assets" in section 20 be limited to publicly traded securities traded on a stock exchange or over-the-counter, including such assets within self-administered registered accounts, and to commodities, futures and currencies that are traded on a commodities exchange.

Recommendation 4-4: That the Act be amended to include a definition of "declarable assets" in section 20 that would include, but not be limited to, the following assets:

- ownership interests in businesses, private corporations and commercial farms;
- investments in limited partnerships that are not publicly traded;
- rental property;
- personal loans of $10,000 or more receivable from persons other than the public office holder's relatives; and
- money owed under a mortgage or hypothec with an outstanding balance of $10,000 or more from persons other than the public office holder's relatives.

Recommendation 4-5: That section 21 be amended to provide expressly for the establishment of conflict of interest screens by public office holders in consultation with the Commissioner where a conflict of interest could very likely arise.

Recommendation 4-6: That section 22 be amended to include the following technical amendments:

- paragraph 22(2)(*b*) should require that the description of liabilities under that paragraph specify the nature, source and amount of the liabilities;
- it should be made clear that child and spousal support payments and court judgments are included under paragraph 22(2)(*b*)*;*
- paragraph 22(2)(*d*) and (*e*) should require that the activities referred to in those paragraphs be reported if they are engaged in on or after appointment as well as those engaged in during the two-year period before appointment;
- paragraph 22(2)(*f*) should only require the reporting of activities as trustee, executor or liquidator of a succession or holder of a power of attorney that occur on or after the day of appointment.

Recommendation 4-7: That subsection 22(5), dealing with the reporting of material changes, become a separate section following section 22 to make it clear that this is an ongoing obligation.

Recommendation 4-8: That the threshold for disclosing gifts or other advantages accepted from any one source be reduced to a minimal amount (such as $30, individually or cumulatively).

Recommendation 4-9: That section 24 be amended to require reporting public office holders to disclose, in addition to firm offers of employment, firm offers relating to contracts of service, appointments to boards of directors and partnership relationships.

Recommendation 4-10: That the wording of section 25 be amended to make it clear that the deadlines currently established are deadlines for reporting public office holders to make the related disclosures to the Commissioner for the purposes of public examination.

Recommendation 4-11: That, if Recommendation 4-5 is accepted, subsection 25(1), relating to disclosures of recusals, be amended to include conflict of interest screens.

Recommendation 4-12: That, if Recommendation 3-8 in Chapter 3 is not accepted, subsection 25(4) be amended to include public reporting of any exception granted under subsection 15(1.1).

Recommendation 4-13: That subsection 25(5) be amended to reduce the value of $200 to a lower amount, if a lower amount is established pursuant to Recommendation 4-8.

Recommendation 4-14: That subsection 25(6) be amended to add ministerial advisers and ministerial staff to those required to make a public declaration in respect of travel on non-commercial aircraft that has been accepted in accordance with section 12.

Recommendation 4-15: That section 26 be amended to require that reporting public office holders finalize all initial compliance measures under the Act within 120 days after the date on which they were appointed and that a summary statement be made available on the public registry once this is completed.

Recommendation 4-16: That the Act be amended to require that material changes be publicly declared if such a change affects a current declaration or if a public declaration would have been required had this information been disclosed at the time of the initial disclosure process.

Recommendation 4-17: That the Act be amended to explicitly provide the Commissioner with the discretion to extend all deadlines for disclosures where appropriate.

Recommendation 4-18:

- That subsection 27(1) be amended to apply only to those reporting public office holders with a significant amount of decision-making power or access to privileged information, such as ministers, ministers of state, parliamentary secretaries, chiefs of staff and deputy ministers; and
- That section 27 be amended to require that the controlled assets of all other reporting public office holders be subject to a conflict of interest test. Where there is a conflict of interest, these reporting public office holders would be required to sell those controlled assets in an arm's length transaction.

Recommendation 4-19: If Recommendation 4-18 is accepted, subsection 27(10), which sets out a minimal value exception, would become largely irrelevant and could be repealed.

Recommendation 4-20: That the Act be amended to establish a 30-day deadline for the completion of the annual review process commencing on the date of the letter initiating the annual review process.

Recommendation 4-21: That section 32 be amended to require a departing public office holder to inform the Commissioner of his or her departure as soon as the departure date is determined.

Recommendation 4-22: That paragraph 22(2)(*d*) of the Act be amended to extend to non-reporting public office holders the requirement to disclose to the Commissioner a description of outside activities referred to in subsection 15(1).

Recommendation 4-23: That subsection 22(5) of the Act also be amended to require non-reporting public office holders to disclose to the Commissioner material changes in relation to outside activities referred to in subsection 15(1).

Recommendation 4-24: That section 25 of the Act be amended to require that a public declaration be made in relation to all outside activities referred to in subsection 15(1) engaged in by non-reporting public office holders.

Recommendation 4-25: That subsection 25(1) be amended to require that non-reporting public office holders, as well as reporting public office holders, disclose any recusal to the Commissioner within 60 days of the recusal taking place and that a public declaration be made.

Recommendation 4-26: That section 23 of the Act, relating to the disclosure to the Commissioner of gifts or other advantages, be amended to apply to all public office holders.

Recommendation 4-27: That subsection 25(5), relating to the public declaration of gifts or other advantages, be extended to apply to all public office holders, where the gifts or other advantages relate to their duties as public office holders.

Chapter 5: Post-employment—Part 3 (Sections 33–38)

Recommendation 5-1:	That the prohibition in subsection 35(1) be expanded to include direct and significant official dealings that a reporting public office holder had during his or her last year in office, not only "with" entities, but also "in relation to" entities.
Recommendation 5-2:	That subsection 35(1) be amended to include partnership relationships as well as contracts of service, appointments to boards of directors and employment.
Recommendation 5-3:	That subsections 35(1) and (2) be amended to prohibit former reporting public office holders from participating indirectly in any of the activities that are directly prohibited by those subsections.
Recommendation 5-4:	That the Act be amended to reflect exceptions from the general rules in section 35 to allow for movement within the federal public sector and from a minister's office to the office of a political party.
Recommendation 5-5:	That the reference to paragraphs 5(1)(*a*) and (*b*) of the *Lobbying Act* in section 37 be replaced by a list of the activities that are intended to be covered and that a deadline of seven days be added to report such activities.
Recommendation 5-6:	That the Act be amended to require former reporting public office holders to report any firm offers of a contract of service, an appointment to a board of directors, a partnership relationship or employment during their cooling-off period, within seven days of the offer.
Recommendation 5-7:	That the Act be amended to require former reporting public office holders to report on their duties and responsibilities in relation to their new contracts of service, appointments to boards of directors, partnership relationships or employment during their cooling-off period, including a description of their duties and responsibilities and information on any measures taken to ensure compliance with the Act. A deadline of 30 days from the start date of their new position would also be required.

Chapter 6: Administration and Enforcement—Part 4 (Sections 43–62)

Recommendation 6-1: That the Act be amended to include a requirement for all public office holders to participate in a training session on the Act within a reasonable period after their appointment.

Recommendation 6-2: That the Act be amended to provide for a process that would allow for the Commissioner to undertake a preliminary review of a request for an examination, including any response from the subject of the request, before the Commissioner determines whether an examination is warranted.

Recommendation 6-3: That the Commissioner be expressly permitted to comment publicly to correct misinformation, or to explain his or her reasons for not pursuing a matter that has been raised in the public domain, where doing so is in the public interest or serves to clarify the mandate of the Office.

Recommendation 6-4: That the Act be amended to require that a Senator or Member of the House of Commons requesting an examination refrain from commenting publicly on the request until the Commissioner has confirmed that he or she has received the request and has notified the person who is the subject of that request.

Recommendation 6-5: That section 68 of the Act be repealed.

Recommendation 6-6: That the Act be amended to ensure that the Commissioner is given direct and timely access to any document requested in the course of conducting an examination under the *Conflict of Interest Act*, including Cabinet confidences and documents in the possession of the House of Commons.

Recommendation 6-7: That Part 5 be amended to include a provision allowing for certification of a summons or compliance order issued by the Commissioner that would be enforceable by the Federal Court.

Recommendation 6-8: That the Act be amended to provide that no examination can be initiated in relation to any activity in respect of which written advice was provided by the Commissioner unless new information relating to that activity is brought to the attention of the Commissioner.

Recommendation 6-9: That subsection 51(1) be amended to require that all compliance orders issued under section 30 be publicly declared.

Recommendation 6-10: That, if Recommendation 4-10 is accepted, an amendment be made to paragraph 51(1)(*a*) to refer to disclosures made under section 25 rather than public declarations made under that section.

Recommendation 6-11: That, if Recommendation 4-20 is accepted, section 52 be amended to require that a failure to meet the deadline for completing an annual review be subject to an administrative monetary penalty.

Recommendation 6-12: That the Act be amended to extend the administrative monetary penalty regime to apply during post-employment to cover failures to meet reporting deadlines.

Recommendation 6-13: That section 52 be amended to provide for penalties for substantive contraventions of the Act where an examination is not warranted because it is clear that a contravention has occurred. These could be applied, for example, in relation to gifts (section 11), prohibited activities (section 15), holding controlled assets (section 17) and failures to recuse (section 21). Penalties relating to sections 11 and 21 should apply to non-reporting public office holders as well as reporting public office holders.

Recommendation 6-14: That consideration be given as to whether it would be desirable to impose a penalty where an examination results in the finding of a contravention.

Recommendation 6-15: That the Act be amended to provide for a retention period for information collected by the Office of 10 years following the last activity related to an individual's position as a public office holder, or, in the case of a reporting public office holder, 10 years following his or her cooling-off period.