

## New York State Ethics Commission

**Advisory Opinion No. 03-6:** Reconsideration of Advisory Opinion Nos. 90-15 and 93-06: Application of the financial disclosure filing requirements of §73-a of the Public Officers Law to individuals serving in academic titles at the State University of New York.

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### INTRODUCTION

In Advisory Opinion No. 90-15, dated June 21, 1990, the New York State Ethics Commission ("Commission") determined that academic employees of the State University of New York ("SUNY") could meet the financial disclosure filing requirements of Public Officers Law §73-a by filing a short form with their respective appointing authorities. In Advisory Opinion No. 93-06, the Commission permanently adopted the short form process for SUNY academic employees and delegated to their appointing authorities the responsibility for collecting and auditing the forms for conflicts or potential conflicts of interest.

Pursuant to the authority vested in it by Executive Law §94(15), the New York State Ethics Commission ("Commission") renders its opinion that, for reasons set forth below, the financial disclosure process previously instituted by the Commission is hereby modified for academic employees of SUNY.

Beginning with the 2002 filing year ending November 15, 2003, academic employees of the SUNY system, who earn in excess of the filing rate, as well as employees designated as policymakers, will be required to complete the statutorily mandated financial disclosure statement set forth in Public Officers Law §73-a. Electronic filing of the financial disclosure statements, currently available to all State employees, will be made available to all academic employees of SUNY. In addition, any SUNY academic employee who is not engaged in obtaining grants or any other activity as specified in Executive Law §94(9)(k), may seek an exemption from filing the statutory disclosure statement.<sup>1</sup> The Commission will no longer require a supplemental financial disclosure filing for grant applicants ("SUNY-2" form).

### BACKGROUND

The Ethics in Government Act of 1987, effective January 1, 1989, imposed for the first time the requirement that certain individuals, defined as "state officers or employees," submit Annual Statements of Financial Disclosure to the Commission. The definition of "state officer or employee" did, and still does, include employees of SUNY who have been designated as policymaking or who earn in excess of the filing rate.<sup>2</sup> The Legislature made no special provision or exception for academic employees of SUNY.

In 1990, pursuant to Executive Law §94(9)(h), SUNY and the employee organizations representing individuals serving in academic titles, sought an exemption for academic employees subject to the §73-a filing requirement. These parties argued that "very few other States impose such a statutorily defined financial disclosure requirement on academics" and that to require it in

New York would place SUNY “at a competitive disadvantage in trying to attract the best talent to serve, considering that each University recruits nationwide and other universities have no such requirement.”

After considering the extent of research funding activity within the university systems, conflict of interest standards applicable to grant activities, and the extent to which other universities address conflict of interest issues, the Commission concluded that while “academic employees comprise a unique category of employee” and that “the public interest does not require . . . complete disclosure from academic employees”, general disclosure of certain outside employment activities was required. The Commission created a short form filing process, whereby academic employees earning compensation at or in excess of the filing rate, would be required to file an annual disclosure statement, consisting of a single question, similar to Question No. 13 of the statutory statement (“SUNY-1 form”). The question solicits information concerning "outside activities, outside interests and employment and honoraria." As part of Advisory Opinion No. 90-15, academic employees applying for research grants were also required to file with their appointing authority, at the time of such grant filing, a second disclosure statement containing information similar to Questions 4, 5, and 16 of the statutory statement (“SUNY-2 form”). Campuses were directed to collect and audit the disclosure statements at the local institution and refer any conflicts or potential conflict of interests to the Commission. The Commission ruled that the filing procedure would remain in effect for a two-year period, from September 1990 until August 1992.

In Advisory Opinion No. 92-15, dated August 13, 1992, the Commission extended the financial disclosure filing process established in Advisory Opinion No. 90-15 "[p]ending the Commission's review of staff's recommendations and action to modify, renew or adopt all or part of the . . . process . . . "

From March to September 1992, the Commission's investigative staff conducted site visits at SUNY campuses to evaluate the effectiveness of the financial disclosure filing process for academics established by Advisory Opinion No. 90-15. In addition to conducting random audits of the forms, the investigative staff evaluated security and access to the forms maintained by each campus, "request to review" procedures, and the adequacy of the information captured by the forms. On October 27, 1992, Commission staff prepared and presented to the Commission a report including findings and recommendations. As a result of that report, and subsequent meetings with the initial requesting parties, the Commission, in Advisory Opinion No. 93-06, adopted as permanent, the two-step filing system with only minor changes to the text of the questions asked.

Over the course of the next ten years, the two-step short-form filing process generally proceeded uninterrupted. In 1994, the federal government imposed new financial disclosure and conflict of interest reporting requirements for grant applicants serving as principal or co-principal investigator or project or co-project director through the National Science Foundation or U. S. Public Health Service. In cooperation with SUNY representatives, additional language was added to the SUNY-2 form to fulfill the federal requirement.

Throughout the ten year period, the Commission did not receive a single referral from SUNY, identifying a conflict of interest or potential conflict among the SUNY employees filing the SUNY-1 form. The Academic Filers Financial Disclosure Manual (“Manual”), initially prepared by the Commission and supplied to the campuses, has not been regularly updated. And, while the Commission conducted extensive training for campus personnel responsible for the financial disclosure process in the first year of the two-step program, little follow-up training was conducted by SUNY or by the Commission.

In 2000, the Office of the State Comptroller (“OSC”) conducted an audit and issued a report (Report 2000-S-11) on SUNY’s financial disclosure reporting for academic employees. The OSC audit team visited six campuses<sup>3</sup> to determine whether SUNY was “in compliance with Ethics Commission financial disclosure reporting for academic employees.” Finding “considerable noncompliance” with Commission requirements pertaining to the timeliness, completeness and extent of review of financial disclosure reports for academic employees,” the OSC noted “there is increased risk for situations to be undetected where an academic employee is involved in outside professional or business activities which interfere or conflict with their responsibilities to SUNY.” The OSC audit noted that required information on the SUNY-1 and SUNY-2 forms was, in some cases, missing or incomplete; that campus designees either did not review forms for conflict of interests or did not sufficiently review them; and that, of the six campuses visited, only one had a complete Manual available for use by the designee when reviewing the financial disclosure forms. The OSC also observed that “few potential conflicts of interests have been reported to [SUNY] System Administration for internal resolution as a result of the process and oversight for the SUNY-1 and SUNY-2 forms at the campuses.”

OSC made four recommendations including follow-up with each of the six campuses to ensure identified weaknesses have been corrected; providing campuses with guidelines, support and training to improve compliance with the filing process; conducting periodic monitoring and oversight of campus operations to ensure on-going compliance with financial disclosure reporting requirements; and resolving inconsistencies between the Manual and the advisory opinion with respect to where campuses are to report conflicts or potential conflicts of interest.

Following release of the OSC audit in November 2000, and an OSC follow-up review in August, 2002, the Commission took the opportunity to re-consider and re-evaluate the short form filing process for SUNY academics. The Commission solicited, received and reviewed the thoughts and concerns expressed by SUNY and the United University Professions (“UUP”). The Commission concludes that, in view of the OSC audit findings, technological advances which now render electronic filing of financial disclosure statements an efficient alternative and the Commission’s statutorily mandated oversight for detecting actual and potential conflicts of interest among all State employees, the financial disclosure process previously instituted by the Commission must be modified as set forth in this Opinion.

### **APPLICABLE STATUTES**

Public Officers Law §73-a, which provides for financial disclosure, defines the term “state agency” to include:

(1)(b) [t]he state university of New York . . . including all their constituent units except community colleges of the State University of New York . . . .

Individuals defined as a “state office or employee” which include:

(1)(c)(ii) officers and employees of statewide elected officials, officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies, who receive annual compensation in excess of the filing rate established by paragraph (1) of this subdivision or who hold policy-making positions . . .

are required to file the annual statement of financial disclosure.

Pursuant to §94(9)(k) of the Executive Law, the Commission is empowered to grant exemptions from the filing requirement:

[w]here, in the discretion of the commission, public interest does not require disclosure and the applicant's duties do not involve the negotiation, authorization or approval of:

(i) contracts, leases, franchises, revocable consents, concessions, variances, special permits, or licenses as defined in section seventy-three of the public officers law;

(ii) the purchase, sale, rental or lease of real property, goods or services, or a contract therefor;

(iii) the obtaining of grants of money or loans; or

(iv) the adoption or repeal of any rule or regulation having the force and effect of law.

In addition, Commission regulations found at 19 NYCRR Part 935.3(d)(3), Procedure for Requesting an Exemption From Filing a Financial Disclosure Statement, provide, in relevant part:

[w]here the Commission determines that it is in the public interest to require that an individual file a financial disclosure statement even though the duties may not exclude an exemption, or where the Commission determines that the duties of a position require the filing of a disclosure statement and the requirement to file the disclosure statement as set forth in §73-a of the Public Officers Law may not be in the public interest, the Commission may require individual(s) who serve in such title(s) or job classification(s) to file a short form disclosure statement which shall contain only that information from the financial disclosure statement required by §73-a which the Commission determines is appropriate and necessary for that title or job classification.

The financial disclosure filing requirement imposed by the Ethics in Government Act was aimed, in part, at restoring the public's confidence and trust in the integrity of individuals who serve as State officers and employees. By providing required information to the Commission, most of

which is available for public inspection, the public can determine whether public servants are acting in the interests of the State, or solely for their own personal gain.

## **DISCUSSION**

### Filing Process

The OSC follow-up audit (Report 2002-F-10) noted that SUNY Systems Administration had taken actions to address the procedural concerns identified in the earlier audit, including distributing Manuals to all the campus designees. With regard to training, support and periodic monitoring of the disclosure process recommended in the initial audit, the audit stated that SUNY had commenced discussions with the Commission to make available to academic employees electronic filing (“e-filing”) of financial disclosure forms as an alternative to the hard copy filing. At the time of the follow-up audit, open questions remained as to whether hard copy forms would be retained by the campuses and which entity would be responsible for reviewing them. Retention of the forms by the Commission would eliminate the need for training support and monitoring of the filing process by campus officials, as recommended in the first OSC audit.

In calendar year 2002, electronic filing of the statutory financial disclosure form was offered to all 19,200 State officers and employees who were required filers. Of that total, over 25 percent opted to participate in the e-filing program. The Commission anticipates that the number of employees electing to file the form electronically will increase as the program continues. Results for calendar year 2003 indicate that approximately 45 percent of all required filers electronically filed the disclosure statement. The e-filing system saves most employees a great deal of time in subsequent filing years, since answers submitted for the previous year need only be revised and resubmitted, as necessary. From an administrative perspective, the efficiency of the e-filing process saves work hours as well as State tax dollars by reducing the need to open, log and process thousands of paper financial disclosure statements.

SUNY will benefit from the ease and efficiency of this filing alternative, as it will mean the process of collecting, auditing and retaining the forms and filing information will be returned to the Commission. In accordance with Executive Law §94(17)(a) and 19 NYCRR Part 937, the Commission will make annual statements of financial disclosure available for public inspection.

### Areas for Consideration

The initial OSC audit touched on the content and review of the SUNY-1 form noting that campus designees “either did not review forms for conflict of interests or did not sufficiently review them. One [campus designee] admitted to not knowing what to look for to detect a conflict of interest.” The OSC audit team also observed that “few potential conflicts of interest have been reported . . . ”

Defining a conflict of interest or potential conflict in the academic arena has become increasingly complex over the years. First, as a practical matter, it is difficult, and in some cases impossible, to identify actual or potential conflicts of interests based solely on a one question disclosure statement. In 1990, it was the intention of the Commission that department chairs, with

knowledge of an academic's campus responsibilities and outside endeavors, would audit the disclosure forms. The Commission has learned that this task has been largely delegated to low and mid-level human resource managers, who are not in the best position to identify actual or potential conflicts among the various academic disciplines. Additionally, while SUNY has indicated its commitment to a "rigorous monitoring and oversight of the process", it has not required that department chairs or their equivalents, be responsible for the auditing function.

Second, in recent years, there has been an exponential surge in externally-funded grants to SUNY. In 1991, one year after the Commission instituted the two-step short form filing process, the SUNY Research Foundation ("SUNY RF"), a closely affiliated entity of SUNY, managed approximately \$333 million in grants from the State and federal government, corporations and foundations in support of campus-based research and training programs. In 2001-2002, such support exceeded \$565 million. In 2000-2001, Chancellor King called for the "infusion of \$5 billion in new resources by 2005," including research activity.<sup>4</sup> While much of the support for grants comes from federal sources, 27.8 percent comes from not-for-profit organizations, business and industry. As a result of this influx in external funding, there is less of a basis for a special form for academics. As a matter of public policy, monitoring the relationship between academic employees and their outside business and professional relationships for potential conflicts of interest is warranted.

Both SUNY and UUP have argued that any additional financial disclosure reporting requirement could affect SUNY's ability to recruit and retain highly qualified scholars and academicians. The Commission has no reliable evidence or empirical data that supports this position. Attracting eminent scholars and enforcing the State's ethics laws are not mutually exclusive.

Finally, the Commission has witnessed an increased emphasis by the State on collaborative efforts between business and academia to, in part, generate economic development and bring high technology to various regions of the State. The establishment of technology and business "incubators" on State campuses and major university and business collaboratives have all contributed to the creation of a complex web of relationships and the potential for conflict, the extent to which was never anticipated in 1990. Disclosure of personal, financial and business interests serve to maintain the integrity of these 21st century relationships between government and industry. In fact, in many cases, disclosure - in and of itself - is a sufficient disinfectant to assuage concerns over any apparent or potential conflict of interest. To that end, the Commission is further persuaded that returning academic employees to the fold of State officers and employees who are required to complete questions from the statutorily mandated financial disclosure statement is appropriate.

### The Disclosure Statement

The Commission will require academic employees of SUNY who earn compensation in excess of the filing rate set by Public Officers Law §73-a (this year, \$70,851) to file with the Commission the statutory annual statement of financial disclosure. Pursuant to Executive Law §94(9)(k) and 19 NYCRR Part 935, academic employees, like all other required filers who have not been designated as holding policymaking positions, may seek an exemption from filing the financial disclosure statement. It is anticipated that a return to the statutory form and exemption

process will reduce the number of academic employees required to file a disclosure statement, while capturing more substantive information from a limited number of individuals engaged in grant work or those activities not exempt under Executive Law §94(9)(k).

### SUNY-2 Form

Because of the results of this opinion, the Commission will no longer require a SUNY-2 supplemental financial disclosure filing for academic employees involved in grant activity.

## **CONCLUSION**

The Commission hereby renders its opinion that, for the reasons set forth above, the financial disclosure process instituted by the Commission in Advisory Opinion No. 90-15 and rendered as permanent in Advisory Opinion No. 93-06, is hereby modified for academic employees of SUNY.<sup>5</sup>

For the 2002 filing year ending November 15, 2003<sup>6</sup>, academic employees of SUNY, who earn in excess of the filing rate, will be required to complete the statutorily mandated financial disclosure statement contained in Public Officers Law §73-a. Electronic filing of the financial disclosure statements will be made available to all required academic filers of SUNY. In addition, individuals who are not engaged in grant activity or any other activity as specified in Executive Law §94(9)(k), may seek an exemption from filing the statutory disclosure statement. The Commission will no longer require a supplemental financial disclosure filing for grant applicants ("SUNY-2" form).

This opinion, unless and until amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion or related supporting documentation.

All Concur:  
Paul Shechtman, Chair  
Robert J. Giuffra, Jr.  
Carl H. Loewenson, Jr.  
Lynn Millane, Members

Dated: July 29, 2003

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### **Endnotes**

<sup>1</sup> *Policymaking employees may not seek such an exemption. [See, Executive Law §94(9)(k)].*

<sup>2</sup> *The annual filing rate in 1992 was \$53,171. The filing rate in 2003 is \$70,851. [See, Public Officers Law §73-a(1)(c)(ii)].*

<sup>3</sup> *These are the University Centers at Albany, Binghamton, Buffalo and Stony Brook; the Health Science Center at Brooklyn and the College at Purchase.*

<sup>4</sup> *Annual Report to the Board of Trustees by Chancellor King, December 18, 2001.*

<sup>5</sup> *Advisory Opinion No. 90-15 also permits City University of New York (“CUNY”) academic employees to file a short form to satisfy the financial disclosure requirements. The Commission has commenced discussions with CUNY with regard to the applicability of this opinion to CUNY academic employees.*

<sup>6</sup> *Pursuant to the Commission’s authority at Public Officers Law §73-a(2)(a) to extend the May 15th filing deadline, the Commission extends the filing deadline for SUNY academic employees for reasons attendant to the academic calendar year.*