

Serving Two Masters

Outside Income and Conflict of Interest in Albany

February 2015



Endorsed By: New York Public Interest Research Group
Reinvent Albany • Common Cause NY

Acknowledgements

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SERVING TWO MASTERS: EXECUTIVE SUMMARY

In the aftermath of the Watergate crisis, Congress adopted fundamental and lasting reforms. New York is now at its Watergate moment. In the last few years New Yorkers have seen scandals engulf a governor, a comptroller, Senate leaders, and now the long-time leader of the Assembly. Like that long-ago Congress, New York State has begun a debate over the propriety of lawmakers generating income from activities outside their legislative salaries. The fundamental question that New Yorkers and their elected policymakers in Albany face is clear: Can lawmakers serve “two masters?”

To answer these vexing questions this report reviewed state laws and regulations, and the post-Watergate reforms adopted by Congress. The goal was to find the most effective way to raise ethical standards, boost New Yorkers’ trust in their state government, and ensure that lawmakers serve one, and only one “master:” The public.

The answer is clear: **The state Legislature should do what Congress did after Watergate: dramatically restrict outside earned income for lawmakers, and enact strong disclosure and conflict-of-interest rules for income earned by lawmakers and senior staff.** New York State should follow the congressional model for limiting the amount of outside earned income to 15% of the highest salary actually paid to any sitting legislator and prohibit legislators and senior staff from engaging in services that involve a fiduciary relationship.

SUMMARY OF FINDINGS

Finding: The U.S. Congress has established strict limits on outside income. In language that resonates in New York almost forty years later, the U.S. House of Representatives explained why it originally sought to limit outside earned income: “Moreover, many citizens perceive outside earned income as providing Members with an opportunity to ‘cash in’ on their positions of influence. Even if there is no actual impropriety, such sources of income give the appearance of impropriety and, in so doing, further undermine public confidence and trust in government officials.”¹

Finding: An overwhelming majority of New York State lawmakers reported having generated no, or very little, outside earned income. Over two-thirds of current state lawmakers who filed financial disclosure forms in 2014 as members of either the Senate or Assembly reported either no outside employment income or employment income that did not exceed \$20,000. According to our review of lawmakers’ financial disclosure forms, 35 of 53 state Senators, who were in their office during the last disclosure period and currently serve, had either no outside employment income (29) or employment income that was less than \$20,000 (6). Our review of the state Assembly has yielded a similar result: 97 of the 134 members either reported no outside income (80) or income that was less than \$20,000 (17). Put another way,

¹ Commission on Administrative Review, Financial Ethics, H. Doc. 95-73, 95th Cong., 1st Sess. 10 (1977) (cited in House Ethics Manual, Outside Employment and Income at p. 213).

only a third of state legislators reported more than \$20,000 in earned income in their financial disclosure reports.

Finding: Other states offer strong models for disclosure of lawmakers' outside income.

When it comes to disclosure of outside income, both by lawmakers, as well as family and household members, the State of Alaska contains perhaps the strongest reporting requirements of any state, including the dates and approximate number of hours worked or that will be worked and “a description sufficient to make clear to a person of ordinary understanding the nature of each service performed or to be performed and the date the service was performed or will be performed.” The District of Columbia requires a narrative description of services performed in connection with outside income activities, as well as listing of professional and occupational licenses held by the public official and his or her family.

SUMMARY OF RECOMMENDATIONS

New York State should dramatically restrict outside employment income for lawmakers and enact strong disclosure and conflict-of-interest rules for allowed income and for income earned by lawmakers' family members. New York State should follow the Congressional model for limiting the amount of outside earned income to 15% of the highest salary paid to any sitting legislator² and prohibit legislators and senior staff from engaging in services that involve a fiduciary relationship.

New York should follow the Congressional model, which eliminated all leadership stipends regardless of seniority or committee responsibilities, with the exception of the Speaker of the House and President pro tempore of the Senate and the minority leader in each house being compensated above the rank-and-file pay level.

As seen in the findings, such a restriction would have no significant impact on the vast majority of current members since 66 percent of Senators and 73 percent of Assemblymembers reported income of less than \$20,000.

New York should adopt a Code of Ethics that clearly states that public office is a public trust and makes clear that state lawmakers are accountable to the public first and foremost.

New York should use the financial disclosure provisions of the State of Alaska and District of Columbia. They establish a scope of disclosure, and level of detail that New York can use as models for the reporting of outside income.

² Pursuant to Legislative Law section 5, the base salary for a Member of the Senate or Assembly is \$79,500. The highest legislative leadership allowance under law is \$41,500 for the President pro tempore of the Senate and Speaker of the Assembly. Legislative Law section 5-a. Thus the highest salary paid to a sitting legislator in 2015 will be \$120,000. Fifteen percent of this amount is \$18,000.

SERVING TWO MASTERS: **EXAMPLES OF CORRUPTION AND SCANDAL LINKED TO OUTSIDE INCOME**

“I seen my opportunities and I took ‘em.”
George Washington Plunkitt³

The recent arrest, criminal complaint and indictment of former Assembly Speaker Sheldon Silver is simply the latest in a series of scandals involving the conflicts created by allowing sitting legislators to earn unlimited, unrestricted income from outside jobs.

While most New York Senators and Assemblymembers have little or no significant outside income (see following section), the ability of sitting lawmakers to profit in any profession or business has been central to these recent scandals:

Sheldon Silver: Earlier this year, then-Assembly Speaker was indicted for allegedly being paid some \$4 million over the past decade for legal work that he failed to perform and in some instances failed to disclose.⁴ Subsequently, the New York State Joint Commission on Public Ethics (JCOPE, the state’s ethics law enforcement agency) has recommended a financial penalty against Assemblymember Silver.⁵

Joseph Bruno: Former Senate Majority Leader Bruno was tried and convicted in federal court for violating the “honest services” law, but was subsequently acquitted in a second trial after the U.S. Supreme Court raised the standards for showing a violation of the law.⁶ Undisputed was that Senator Bruno’s private consulting business created potential conflicts between his public responsibilities and his personal business dealings.⁷ Unrelated to those charges and never subject to formal complaint, in 1990 then Senator Bruno sold the telecommunications company he owned to a company partially owned by the insurance industry shortly after Bruno had served as chair of the Senate Insurance Committee.⁸

John Sampson: Former Senate Majority Leader and current Senator Sampson has been indicted and faces trial in Federal Court on charges that while a sitting New York State Senator he allegedly embezzled some \$400,000 in funds he was entrusted to oversee in his private law practice and kept secret his ownership interest in a liquor store.⁹

³ “Plunkitt, Champion of ‘Honest Graft,’ Old-Time Tammany Leader Saw His Opportunities and Took Them,” *The New York Times*, November 23, 1924.

⁴ United States of America v. Sheldon Silver, February 19, 2015.

⁵ New York State Joint Commission on Public Ethics, “Notice of Delinquency,” to Assemblymember Silver, February 13, 2015.

⁶ *Associated Press*, “Joe Bruno Found Not Guilty – Again – In Albany Corruption Trial,” May 16, 2014. Accessed at: http://www.syracuse.com/news/index.ssf/2014/05/joe_bruno_found_not_guilty_-_again_-_in_albany_corruption_trial.html.

⁷ *Ibid.*

⁸ Cooper, M., Hakim, D., “Bruno Is Subject to Inquiry by F.B.I.,” *The New York Times*, Accessed at: <http://www.nytimes.com/2006/12/20/nyregion/20bruno.html?ref=nyregion>.

⁹ Marzulli, J., “State Sen. John Sampson hit with additional charges he lied about liquor store,” *New York Daily News*, February 14, 2014. Accessed at <http://www.nydailynews.com/new-york/state-sen-sampson-hit-charges-article-1.1600758>.

Anthony Seminerio: Former Assemblymember Seminerio died in Federal Prison in January 2011 while serving a six-year sentence for his conviction on influence-peddling charges related to his operation of a private consulting business that used his legislative position to generate income.¹⁰

Pedro Espada: Former Senator and briefly Senate Majority Leader, Pedro Espada was convicted by a Federal jury of embezzling hundreds of thousands of dollars from the health care clinic network he had created and ran in the Bronx, despite having an annual salary of \$235,000 with generous perks on top of his legislative pay.¹¹

Nicholas Spano: Former Senator Nicholas Spano pleaded guilty to Federal charges of hiding outside consulting fees he received from an insurance brokerage firm doing business with the state from 1993 to 2008, two years after he left office. Spano also failed to make required disclosures on his state ethics filings.¹²

Guy Velella: In 2004, former Senator Guy Velella pleaded guilty to bribery charges for taking monies to secure bridge painting contracts as part of his outside legal work. In the 1990s, Velella was criticized for taking hundreds of thousands of dollars in legal work from insurance interests while he chaired the Senate Insurance Committee.¹³

¹⁰ Halbfinger, D., Rashbaum, W., "Former Assemblyman Seminerio Dies In Prison," *The New York Times*, January 6, 2011. Accessed at <http://cityroom.blogs.nytimes.com/2011/01/06/former-assemblyman-seminerio-dies-in-prison/>.

¹¹ Secret, M., "Espada Sentenced To Five Years For Stealing From Nonprofit," *The New York Times*, June 14, 2013. Accessed at <http://www.nytimes.com/2013/06/15/nyregion/espada-sentenced-to-5-years-for-stealing-from-nonprofit.html?ref=topics>.

¹² Rashbaum, W., Hakim, D., "Ex-Westchester Senator Admits To Tax Obstruction," *The New York Times*, February 10, 2012. Accessed at: <http://www.nytimes.com/2012/02/11/nyregion/nicholas-spano-ex-state-senator-pleads-guilty-to-tax-obstruction.html>.

¹³ Hevesi, D., "Guy J. Velella, State Senator From Bronx, Dies at 66," *The New York Times*, January 27, 2011. Accessed at www.nytimes.com/2011/01/28/nyregion/28velella.html?pagewanted=print.

SERVING TWO MASTERS:
A REVIEW OF THE INCOME OF NEW YORK STATE LAWMAKERS

The following tables are based on information legislators filed with the Joint Commission on Public Ethics (JCOPE) in May of 2014 for the calendar year 2013 (the most recent year available). Under provisions of 2011’s ethics reform law, legislators were, for the first time, required to disclose detailed information relating to the actual value of outside income and investments. This analysis examines only income that was reportedly generated by employment, as compared to capital investments. As a result, rental and investment income were not included as part of employment income for the purposes of this analysis.

The analysis examines only those lawmakers who filed a financial disclosure form with JCOPE and who are currently holding state public office.¹⁴ Newly elected Members and Members that left office are not included in this analysis.

As seen below, roughly half (29 of 53, 55%) of the Senators reported not having received income from an outside job. Combining those who have received a small amount in outside income (those who reported receiving incomes of up to \$20,000 in 2013), *two-thirds* of Senators either have no outside income or a small amount of income from an outside job (35 of 53, 66%).

SENATORS’ OUTSIDE EARNED INCOME

Income ranges	Senate Democrats	Senate Republicans
No outside earned income	20	9
Up to \$20K	4	2
\$20K-\$50K	1	2
\$50K-\$75K	0	4
\$75K-\$100K	1	2
\$100K-\$150K	1	2
\$150K-\$250K	1	4

Similarly, over half (80 of 134 or 60%) of the Assemblymembers reported not having received income from an outside job. Combining those who have received a small amount in outside income (those who reported receiving incomes of up to \$20,000 in 2013), there is a *substantial majority* of Assemblymembers who either have no outside income or a small amount of income from an outside job (97 of 134 or 73%).

¹⁴ See New York State Joint Commission on Public Ethics (JCOPE) website. Accessed at, <http://jcope.ny.gov/elected%20officials/fdselectedofficials.html>.

ASSEMBLYMEMBERS' OUTSIDE EARNED INCOME

Income ranges	Assembly Democrats	Assembly Republicans
No outside earned income	65	15
Up to \$20K	9	8
\$20K-\$50K	7	8
\$50K-\$75K	3	3
\$75K-\$100K	1	2
\$100K-\$150K	4	2
\$150K-\$250K	3	1
\$250K-\$350K	0	0
Over \$350K	1	2

SERVING TWO MASTERS: GOVERNOR CUOMO'S PROPOSAL

Governor Cuomo has responded to the growing concern over the abuses resulting from lawmakers using their public office for private gain. In his speech at New York University School of Law¹⁵ earlier this year, the governor proposed that New York's laws require greater disclosure of outside income:

“We will propose what we call ‘total disclosure’ – the most extensive disclosure of outside income in the United States of America. You have heard the phrase ‘follow the money’. We’re creating a new expression, ‘explain the money.’ Officials will have to disclose to the public all the outside income they receive, from who, for what and whether there is any connection to the state government or the office that they hold.

Ironically, also in his speech the governor offered his views on what he described to be the “cleanest solution:”

“The concept of part-time employment as a legislator is problematic in modern society. A legislator is away from their hometown about six months a year, and for the remainder of the year they have numerous political duties. What job would really accommodate that schedule?

The cleanest solution is to end the conflict rather than attempting to police or regulate it. To end the conflict would be to say we have a fulltime legislature; to pay them a decent salary and ban outside income. This is the absolute remedy and it requires us to grapple with difficult philosophical questions – do we want a fulltime legislature, or a part time legislature? Is the “citizen legislature” model possible today without significant conflicts? Do we want representatives of wealth that don’t need to earn the government salary or do we want working families who actually need the salary? Do we want shorter legislative sessions so people really could have meaningful outside jobs? Do we want to ban any outside income from clients with matters before the State?

No state has done it in the nation – but it would end the conflict, certainly.”

¹⁵ Governor Andrew Cuomo, Ethics Reform Agenda, delivered at New York University School of Law, February 2, 2015. Accessed at <http://www.governor.ny.gov/news/video-and-transcript-governor-cuomo-outlines-2015-ethics-reform-agenda-nyu-school-law>. The governor has introduced legislation on February 20, 2015 that tracks these goals.

While the governor is correct that no other state has enacted strict limits on outside earned income, Congress did so decades ago. Given the enormity of the ethics problems faced by the state, policymakers should follow the best prescription for what ails New York by mandating that while serving in office, lawmakers should serve only one master—the public.¹⁶

¹⁶ The February 2, 2015 speech was the governor’s most detailed statement to date on his prescription to address the lawmaker scandals that have plagued New York. In the policy book accompanying his State of the State Address of January 21, 2015, the governor also proposed establishing a quadrennial commission “to examine, evaluate and make recommendations regarding compensation for the governor, lieutenant governor, attorney general, comptroller, state officers covered by section 169 of executive law, and members of the legislature. . . . The commission shall consider whether there should be a cap on income from outside sources a legislator may receive and may recommend the imposition of such a cap as a condition to receiving a second their adjustment in pay.” 2015 Opportunity Agenda, State of the State, Governor Andrew M. Cuomo, released January 21, 2015. Accessed at www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2015_Opportunity_Agenda_Book.pdf.

SERVING TWO MASTERS:
**BEST PRACTICES AMONG THE STATES; DISCLOSURE, CONFLICTS-OF-
INTEREST, RECUSAL, EXTENSION TO SPOUSES AND FAMILY**

The U.S. Congress places strict limitations on the outside income of lawmakers. In addition, pursuant to the Ethics in Government Act of 1978 the Congress requires annual financial disclosure by Members and high-level staff, including information on their income, investments and liabilities.¹⁷

As the House Ethics Manual reports, financial disclosure requirements are intended

“. . . to deter possible conflicts of interest due to outside holdings. Proposals for divestiture of potentially conflicting assets and mandatory disqualification of Members from voting were rejected as impractical or unreasonable.”¹⁸

It must be underscored that the Congressional financial disclosure requirements were put in place at the time when rules for both the Senate and House *already contained restrictions on the source and limitations on the amount of outside income*. Thus, financial disclosure was an *additional tool* to deter conflicts and improve public confidence in government.

There is a range of approaches in terms of how states require disclosure of lawmakers' outside income. Some states have no such disclosure requirements (*e.g.*, Vermont and Michigan); while other states have extensive disclosure requirements. The States of Alaska and the District of Columbia, in particular, have codified strong disclosure requirements that can serve as useful models.

The State of Alaska's financial disclosure requirements for public officials contain a number of provisions that are worthy of consideration. Alaska requires public officials to provide financial information about the “discloser, the discloser's spouse or domestic partner, the discloser's dependent children, and the discloser's nondependent children who are living with the discloser.”¹⁹

Alaska requires that financial disclosures filed by legislators and other officials contain significant detail about their income and income-generating activities:

(2) as to income or deferred income in excess of \$1,000 earned or received as compensation for personal services, and as to dividend

¹⁷ Title I of the Ethics in Government Act of 1978, as amended, 5 U.S.C. app. 4 sections 101-111.

¹⁸ House Ethics Manual, Financial Disclosure at 250.

¹⁹ Alaska Statutes 24.60.200, Financial Disclosure by Legislators, Public Members of the Committee, and Legislative Directors. Accessed at www.touchngo.com/lglcntr/akstats/statutes/title24/chapter60/section200.htm.

income or deferred compensation in excess of \$1,000 received from a limited liability company as compensation or deferred compensation for personal services, a statement describing

- (A) the names and addresses of the source and the recipient;
- (B) the amount;
- (C) whether it was or will be earned by commission, by the job, by the hour, or by some other method;
- (D) the dates and approximate number of hours worked or to be worked to earn it; and
- (E) unless required by law to be kept confidential, a description sufficient to make clear to a person of ordinary understanding the nature of each service performed or to be performed and the date the service was performed or will be performed;

(3) as to each loan or loan guarantee over \$1,000 from a source with a substantial interest in legislative, administrative, or political action, the name and address of the person making the loan or guarantee, the amount of the loan, the terms and conditions under which the loan or guarantee was given, the amount outstanding at the time of filing, and whether or not a written loan agreement exists.²⁰ [Emphasis added.]

The District of Columbia requires public officials to file an annual financial disclosure that must contain “a narrative description of the nature of the services performed in connection with the official’s outside income.”²¹ The disclosure form requires that District of Columbia public officials disclose the names of each business entity in which the individual or his or her spouse, domestic partner or dependent children has an interest, as well as board, employment and volunteer service and all professional and occupational licenses held by the public official, his or her spouse, domestic partner or dependent children.²²

The State of Florida requires that financial disclosure information be reported in descending size of dollar amount with largest source first, thereby making it easier for the public to review.²³

²⁰ Alaska Statutes 24.60.200(2).

²¹ District of Columbia § 1-1162.24(a)(1)(A)(ii).

²² District of Columbia Code, section 1-1162.24.

²³ Florida Statutes, Title X, Chapter 112.3145(3).

SERVING TWO MASTERS:
**THE CONGRESSIONAL MODEL; STRICT LIMITS ON OUTSIDE INCOME,
PROHIBITIONS ON SOURCES OF OUTSIDE INCOME THAT MAY CREATE
CONFLICTS**

“When a man assumes a public trust, he should consider himself as public property.”
Thomas Jefferson²⁴

Background

The U.S. Senate and House of Representatives offer the strongest model in the nation for reducing the potential for conflicts between lawmakers’ public responsibilities and their private interests. Congressional action followed in reaction to periodic scandals in the nation’s Capitol. In this regard, the trajectory of reform in Congress mirrors New York’s reform efforts in response to scandals over the years. Congress took its most significant action by imposing stringent limitations on outside income as part of a series of reforms adopted in the wake of Watergate.

The authority for each house of Congress to regulate the conduct of and bind its Members through house rules derives from the U.S. Constitution, Article I, section 5.²⁵ This section grants broad authority to Congress to discipline its Members:

“Each house may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”²⁶

As scandals periodically came to light and in response to the public’s increased attention to ethics in government, Congress enacted reforms of the Senate and House.

Congressional reforms initially created criminal sanctions in statute for the most egregious conduct. Starting in the 1950s, the Senate and House from time to time empowered ad hoc committees to conduct investigations into particular matters and created task forces to make recommendations. In 1957, by Resolution the House adopted a Code of Conduct, principles for Members and employees to follow that were precepts of ethical comportment. Notably the Code of Ethics for Government Service concludes with the reminder that “public offices are a public trust.”²⁷ The Senate adopted the identical Code the following year. In the mid 1960s, scandals in the Senate (Bobby Baker) and House (Rep. Adam Clayton Powell, Jr.) helped usher in the modern era of reform for each house, including establishing committees with ethics oversight.

²⁴ Cited in *Bartlett’s Quotations*. See www.bartleby.com/100/pages/page1051.html.

²⁵ Senate Ethics Manual, p. 12. United States Senate Select Committee on Ethics, United States Senate (2003 Edition) p. 12. Accessed at www.ethics.senate.gov/downloads/pdf/manual.pdf.

²⁶ The Constitution of the State of New York contains similar authority in Article III, section 9, which provides that “Each house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members[.]”

²⁷ Code of Ethics for Government Service, House Document 103, 86th Congress, 1st Session, passed by the Congress July 11, 1958. Accessed at <http://lexrex.com/enlightened/laws/ethics.htm>.

A decade later and close on the heels of Watergate and the resulting plummeting public approval and trust in government, in 1977 the House of Representatives and Senate adopted stringent limitations on the amount of outside earned income for Members, officers and senior staff.²⁸

In March of 1977, the House passed House Resolution 287, which imposed outside earned income limitations, required financial disclosures, regulated franking privileges, limited acceptance of gifts and set travel limits.²⁹ On April 1, 1977 the Senate adopted Senate Resolution 110, containing similar limitations on outside earned income.³⁰ These restrictions and limitations have been somewhat revised over time, but their substance is the cornerstone of current law and rules.

In 1978, Congress codified the financial disclosure requirements and franking provisions in the Ethics in Government Act of 1978,³¹ signed into law by President Carter on October 26, 1978.³²

In 1989 Congress significantly strengthened the Ethics in Government Act of 1978 in the Ethics Reform Act of 1989, codifying the outside earned income amount limitation and imposing source restrictions.³³

The restrictions were put in place in an attempt to eliminate the reality and appearance of conflict of interest between Members and highly paid staff on the one hand, and the public they serve on the other. Accordingly, *earned income* is the focus of these restrictions and limitations, with investment income more lightly regulated, but subject to financial disclosure.

As explained by the House Bipartisan Task Force on Ethics, which drafted the Ethics Reform Act:

“The current limitations on earned outside income and honoraria were prompted by three major considerations: First, substantial payments to a Member of Congress for rendering personal services to outside organizations presents a significant and avoidable potential for conflict of interest; second, substantial earnings from other employment is inconsistent with the concept that being a Member of Congress is a full-time job; and third substantial outside income creates at least the appearance of impropriety and

²⁸ These restrictions and limitations, as well as financial disclosure requirements, apply to Congress members, as well as officers and staff compensated at rates equal to or greater than 120% of the basic pay under GS-15 of the General Schedule for at least 60 days in a calendar year. The most recent pay adjustment that went into effect was in January 2009; by Congressional action the pay adjustments since that time have been frozen at the 2009 level.

²⁹ House Rule 25, clause 1(a)(1), adopted March 2, 1977 in H. Res. 287, 95th Congress, 1st Session.

³⁰ S. Res. 110-95th Congress (1977-1978), adopted April 1, 1977.

³¹ Congress passed and President Carter signed into law the Ethics in Government Act of 1978 in Fall of that year, Public Law 95-521, codified as Title 5 United States Code 101. This law established mandatory financial and employment disclosures of public officials and their families; made the disclosures public; and restricted lobbying activities for former public officials.

³² While the provisions have been revised since the 1978 House Rule and incorporation into law in 1989, the earned income provisions remain intact.

³³ P.L. 101-94, 101st Congress, 5 U.S.C., *et seq.* See www.congress.gov/bill/101st-congress/house-bill/3660.

thereby undermines public confidence in the integrity of government officials.”³⁴

Outside “earned income” is defined as “wages, salaries, fees, and other amounts received or to be received as compensation for personal services actually rendered.”³⁵

This represented a major change in approach after incremental attempts to prohibit members and senior staff from actually using, or creating the appearance of, using their positions to make money were deemed ineffective.³⁶ The outside income is deemed earned when the right to receive it is certain and may not be deferred.³⁷

As the bipartisan task force that drafted the law observed, the limits and restrictions were designed to ensure that:

“ . . . Members are not using their positions of influence for personal gain or being affected by the prospects of outside income.”³⁸
 . . .

The salaries of Members of Congress are set in statute subject to automatic pay adjustments. The current salary for U.S. Senators and Representatives is \$174,000.³⁹ Four of the leaders receive elevated pay: the Speaker of the House (\$223,500); the President pro tempore of the Senate, and majority and minority leaders of the Senate and the House (\$193,400).⁴⁰

The Congressional restrictions on outside pay have two key components: 1) A hard dollar cap on outside earned compensation as referenced to the Federal pay scale; and 2) a ban on “earned income” generated by work in covered professions and activities.⁴¹

A. The “cap” on outside income.

In 2014, pursuant to the Ethics Reform Act of 1989 and the rules of the Senate⁴² and House⁴³, members and senior staff⁴⁴ are restricted in the amount and sources of outside income they may

³⁴ House Bipartisan Task Force on Ethics, Report on H.R. 3660, 101st Cong., 1st Sess. 12.

³⁵ House Ethics Manual, Committee on Standards of Official Conduct (2008) at 228. Accessed at http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

³⁶ House Bipartisan Task Force on Ethics, Report on H.R. 3660, 101st Cong., 1st Sess. 12.

³⁷ House Ethics Manual, Committee on Standards of Official Conduct (2008) at 229. Accessed at http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

³⁸ House Bipartisan Task Force on Ethics, Report on H.R. 3660, 101st Cong., 1st Sess. 12.

³⁹ *Congressional Salaries and Allowances in Brief*, Ida A. Brudnick, Congressional Research Service, December 30, 2014 at p. 2. Accessed at www.senate.gov/CRSReports/crs_publish.cfm?pid=%270E%2C*PL%5B%3D%23P%20%20%0A.

⁴⁰ *Ibid.*

⁴¹ There are also bans on serving as compensated corporate and organization directors and officers, a ban on honoraria, restrictions on royalties and the requirement to obtain approval prior to accepting paid teaching positions..

⁴² Senate Ethics Manual, Select Committee on Ethics (2003).

⁴³ House Ethics Manual, Committee on Standards of Official Conduct (2008). Accessed at http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

accept. The law and rules cap the amount of earned outside income they may generate pegged to 15% of the basic pay for level II of the Executive Schedule (\$181,500 for 2014) allowing an additional \$27,225 in outside earned income in 2014 (15% of \$181,500 = \$27,225).⁴⁵ It is worth noting that Congressmembers receive *only* their salaries as compensation for their public service and are not eligible to receive housing or per diem allowances for expenses incurred in Washington.⁴⁶

In addition to Members and officers of each house, the restrictions and limitations apply to senior staff whose pay is 120% the federal General Services pay scale paid at GS-15.

B. Ban on Earned Income from Activities involving a “fiduciary duty”

In addition to setting a hard dollar amount on the amount of earned outside income, Congress has also restricted the permissible *sources* of outside income. Federal law forbids Members of Congress from affiliating with a firm that provides professional services involving a fiduciary relationship or being compensated for practicing a profession that involves a *fiduciary relationship*.

§502. Limitations on outside employment

(a) Limitations. A Member or an officer or employee who is a noncareer officer or employee and who occupies a position classified above GS–15 of the General Schedule or, in the case of positions not under the General Schedule, for which the rate of basic pay is equal to or greater than 120 percent of the minimum rate of basic pay payable for GS–15 of the General Schedule shall not

(1) receive compensation for affiliating with or being employed by a firm, partnership, association, corporation, or other entity which provides professional services involving a fiduciary relationship;

(2) permit that Member's, officer's, or employee's name to be used by any such firm, partnership, association, corporation, or other entity;

(3) receive compensation for practicing a profession which involves a fiduciary relationship;

(4) serve for compensation as an officer or member of the board of any association, corporation, or other entity; or

⁴⁴ Senior non-career employees earning 120% of the minimum basic pay of GS-15 on the federal schedule are subject to the 15% above level II of the Executive Schedule earned income restrictions. See 5 CFR 2636.301 *et seq.* Accessed at www.ecfr.gov/cgi-bin/text-idx?rgn=div5;node=5%3A3.0.10.10.10.

⁴⁵ *Congressional Salaries and Allowances in Brief*, Ida A. Brudnick, Specialist on the Congress, *Congressional Research Service*, December 130, 2014. Accessed at www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E%2C*PL%5B%3D%23P%20%20%0A.

⁴⁶ *Ibid.* The automatic pay increases applicable to Congress have been frozen since 2009.

(5) receive compensation for teaching, without the prior notification and approval of the appropriate entity referred to in section 503.

The federal statutes and house rules do not define “fiduciary,” but the term denotes a relationship of trust and obligation under law. A fiduciary relationship is one where the provider of services owes a duty of undivided loyalty to the recipient of the services and is obliged to act with their best interests in my mind.⁴⁷ Examples of employment that creates fiduciary relationships include lawyers, accountants and financial consultants.

C. Ban on Serving as Corporate or Organization Board Director or Officer

Federal law and Congressional Rules also bar Members from serving as directors and officers for commercial and most nonprofit corporations and organizations.⁴⁸ As is the case with professional services involving fiduciary relationships, service on corporate and organizational boards by law requires undivided loyalty and, accordingly, Congress has substantially restricted Members, officers and senior employees from board service.

D. Additional Restrictions and Limitations

Congress also has banned honoraria (compensation for speeches, articles and appearances). Honoraria that would otherwise be received by a Member, officer or employee may be donated on their behalf to a charitable organization and not deemed received by the Member, officer or Employee. The donation cannot exceed \$2,000 or go to an organization that provides any financial benefit to the Member, officer or employee’s parent, sibling, spouse, child or dependent relative. Federal law and house rules also require that prior ethics committee approval be obtained before accepting a paid teaching position. Members, officers and senior employees may not purchase securities that are part of an initial public offering in any manner not generally available to the public.⁴⁹ The House also closely monitors publishing contracts and requires pre-approval of contracts and bans advance royalties.⁵⁰

⁴⁷ Senate Ethics Manual, p. 72. Accessed at www.ethics.senate.gov/downloads/pdf/manual.pdf.

⁴⁸ Certain exceptions apply, including uncompensated service as an officer or board member of a 501(C)(3) tax exempt organization and either paid or unpaid service on boards where service predated election by at least two years and other criteria are met.

⁴⁹ An Overview of the Senate Code of Conduct and Related Laws, Select Committee on Ethics, United States Senate (June 2014) at 12.

⁵⁰ House Ethics Manual, Outside Employment and Income (2008) at 224. Accessed at http://ethics.house.gov/sites/ethics.house.gov/files/documents/2008_House_Ethics_Manual.pdf.

SERVING TWO MASTERS:
**RECOMMENDATIONS AND THE RATIONALE FOR THE CONGRESS'S CAP ON
OUTSIDE INCOME, NEW YORK STATE EXECUTIVE**

Outside income

It is clear that an important source of the ethical problems plaguing Albany is the ability of sitting lawmakers to earn unrestricted outside income. Legislation should be passed that is modeled on the Congressional system and restricts members of the Legislature from receiving outside earned income in excess of 15% of the highest total salary authorized under law for a sitting legislator in any given calendar year for the duration of their terms in office.

Moreover, as Congress has done, Members of the Legislature should be prohibited from receiving compensation for practicing a profession that involves a fiduciary duty, being employed by a firm that provides professional services involving a fiduciary relationship, allowing their name to be used by a firm that provides professional services involving a fiduciary relationship, receiving compensation as an officer or member of a board of directors, receiving compensation for teaching without prior notification to and approval from the state's Ethics Commission, or receiving advance payments on copyright royalties.

"Outside earned income" should not include salary, benefits, or allowances made by New York State, income from military or National Guard service, income from pensions or other continuing benefits from previous employment, income from certain investment activities, income from family-owned businesses where the member's services are not a material factor in the production of income, copyright royalties, or compensation for services rendered prior to becoming a member of the legislature.

Disclosure requirements

Any income that is allowed—or earned by family members—must be subject to strict disclosure requirements along the lines of those required under Alaska law. Thus, there must be a detailed description of and accounting for any earned income in excess of \$1,000 or any loan in excess of \$1,000 and which comes from a source with a substantial interest in legislative, administrative, or political action, the name and address of the person making the loan or guarantee, the amount of the loan, the terms and conditions under which the loan or guarantee was given, the amount outstanding at the time of filing, and whether or not a written loan agreement exists.

Oversight agency reform

In recent years it is beyond dispute that the only vigorous, proactive ethics enforcement in New York has resulted from actions by the U.S. Attorney's office. New York must boost the independence, transparency and resources of its ethics watchdog agencies so they can assume their positions as the primary monitors and enforcers of the state's ethics laws.