

*Third Constitutional Convention
Commonwealth of the Northern Mariana Islands*

MEMORANDUM:

DATE: June 7, 1995
TO: Herman T. Guerrero, President
FROM: Legal Counsel
SUBJECT: Proposed Rule on Conflicts of Interest

This memorandum considers what conflicts of interest rule, if any, applies or should apply to the delegates to the Third Constitutional Convention. It is prompted by a proposed amendment to the Rules of Procedure introduced by Delegate Joaquin P. Villagomez. The proposed amendment necessarily raises some difficult legal and political questions. Delegate Villagomez temporarily withdrew his motion to amend on the understanding that Legal Counsel would examine the issue, consult with Delegate Villagomez and report back to the Convention.

A. The Proposed Amendment

Delegate Villagomez' proposed amendment reads as follows:

Conflict of Interest. No delegate shall vote or participate in debate upon any matter in which he or she has a financial or personal interest, or upon any matter which will affect his or her right to a seat in the Convention or in which his or her individual conduct is involved. Disclosure shall be made, in writing, to the President, prior to discussion on the floor.

Delegate Villagomez' proposed amendment is modeled on the rule on conflicts of interest of the CNMI House of Representatives.¹

¹ See, Rule XI, section 7 of the Official Rules of the House of Representatives, Ninth Northern Mariana Islands Commonwealth Legislature. The House adheres to such a rule because article II, section 15 of the CNMI Constitution requires it. The House Rule merely mirrors or reiterates the constitutional requirement. The delegates to the Constitutional Convention are not bound by any such constitutional mandate.

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The proposed amendment does not define "personal" or "financial interest."

B. Discussion

Before discussing Delegate Villagomez' proposed amendment, it is necessary to address the question of whether the delegates are subject to the restrictions on debate and voting of Public Law 8-11, "The Government Ethics Code of 1992." If the law is not applicable, then the Convention has to decide whether it wants any conflicts rule at all. If the law is applicable, then the Convention has to decide whether it wants to impose a more rigorous rule - whether along the lines proposed by Delegate Villagomez or otherwise.

1. Relevant Provisions of Public Law 8-11.

Public Law 8-11, section 8435 reads in relevant part:

(a) A public official shall not participate in, vote on, influence, or attempt to influence an official decision if the public official or a business with which the public official is associated has:

(1) a pecuniary interest in; or

(2) a potential benefit from, the matter under consideration by the government entity of which the public official is a member. A potential benefit includes detriment to a business competitor, to the public official, or business with which the public official is associated

(b) Except as permitted in subdivision (c) of this Section, a public official described in this subdivision, but not exempt, shall abstain from participation in the discussion and vote on the decision. The public official's abstention and reason for the abstention must be recorded in the government entity's minutes.

(c) A public official may participate in, vote on, or influence or attempt to influence an official decision

if the only pecuniary interest or potential benefit that may accrue to the public official is incidental to the public official's position, or which accrues to the public official as a member of a profession, occupation, or large class, to no greater extent than the pecuniary interest or potential benefit could reasonably be expected to accrue to all other members of the profession, occupation, or large class.

In other words, section 8435 restrains a public official from participating in the discussion of and voting on an official decision if that public official has a pecuniary interest in or a potential benefit/detriment from the official decision. The restraint is not applicable if the pecuniary interest or potential benefit/detriment would accrue to the public official as incidental to the public official's position, as a members of a profession or occupation or a large class.

2. Applicability of Public Law 8-11 to Convention Delegates

Whether section 8435 applies to the conduct of constitutional delegates turns on the definitions governing the statute. If a delegate to the Convention is a "public official" and if the Convention is a "government entity" within the contemplation of the Act, then the restraints on debate and voting imposed by the Act would seem to apply.

a. Public Official. Section 8404 (1) defines "Public Official" as "any person holding elected office of the Commonwealth." Because constitutional delegates are elected to office, we conclude that they are "public officials" for purposes of the Act.

b. Government Entity. Section 8435 (a) (2) speaks to "matter[s] under consideration by the government entity of which the public official is a member." Whether the Constitutional Convention is a government entity within the contemplation of the Act is a closer matter. Section 8404 (b) defines "Commonwealth Government" as "any administrative unit, board, commission, committee, department, division, executive branch, independent agency, judiciary, legislature, political subdivision, public corporation or public school system of the Commonwealth." The Constitutional

Convention does not neatly fit into any specific letter of this definition. It appears from the inclusive language of the provision that the drafters of the Act intended to give it the broadest possible scope. It is reasonable to assume that the Constitutional Convention is within the scope of the spirit and intent if not the letter of the Act. It is not reasonable to assume that the drafters of the Act would seek to bind constitutional delegates to a lesser ethical duty than that which is imposed on all other elected officials. We therefore conclude that the Constitutional Convention is a "government entity" for purposes of Public Law 8-11.

3. Restraints Imposed by the Act.

Having concluded that the conduct of delegates to the Constitutional Convention is governed by provisions of the Act, we must determine the scope of that limitation. Section 8435 of the Act bars participation in debate and voting on matters in which the public official (i.e. delegate) has a pecuniary (financial) interest or from which the public official (i.e. delegate) may derive a potential benefit or detriment.

a. **Pecuniary interest.** The definition of pecuniary or financial interest is fairly straightforward in the Act. Section 8404 (f) provides that any interest or entitlement worth more than \$5,000 per year or any interest with a cost or present value of \$5,000 or more, and any interest representing more than 10% of a business entity constitutes a "financial interest" for purposes of the Act.

b. **Potential benefit.** Potential benefit is not defined per se; rather, the Act provides that "potential benefit includes detriment to a business competitor, to the public official, or business with which the public official is associated." Section 8435 (a) (2).

Unlike Delegate Villagomez' proposed rule on conflicts, the Act does not purport to bar delegates from participating in debate or voting on a matter in which they have a "personal interest."

4. Exceptions from the Act's Restraints.

Perhaps most useful to the delegates, is section 8435 (c) of the Act which lifts the bar on debate and voting under certain circumstances:

(i) When the benefit/detriment is incidental to the public official's position (e.g. travel benefits to an official of MVB);

(ii) When the benefit/detriment accrues to the public official as a member of a profession, occupation or large class "to no greater extent than the pecuniary interest or potential benefit could reasonably be expected to accrue to all other members of the profession, occupation or large class."

It is the second of these exceptions which are most likely to be invoked by the delegates. The real issue then becomes of whether membership in a specific class, which for example might include all persons of NMI descent (for purposes of Article XII) or all residents of a particular senatorial district, constitutes a large enough group to come within the exception provided by section 8435 (c). We believe that membership in a group of this nature does constitute a class so that the ordinary limitations on public officials for debate and voting would be lifted.

We believe that reliance on these exceptions is entirely appropriate under the circumstances applicable to the Convention. First, the delegates were elected to present their views on a wide range of issues affecting all or many citizens of the CNMI. Second, the views of the delegates with respect to many public issues were fully ventilated to the electorate before the delegates were elected. Third, the Convention will be conducting its deliberations in full public scrutiny, which itself provides meaningful safeguards.

5. Alternatives Available to the Convention.

Assuming that P.L. 8-11 applies to the delegates to the Constitutional Convention, the Convention must decide what, if any, rule on conflict of interest it might adopt. Public Law 8-11 provides limitation on the participation of delegates which represents a minimum or floor to which they must adhere. Consequently, the Convention has several alternative approaches:

First, the Convention could enact no rule and simply allow the operation of Public Law 8-11 to govern the conduct of delegates..

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Second, the Convention could enact a rule which references Public Law 8-11 as an acknowledgment that the delegates are mindful of and intend to adhere to the limitations imposed by the Act.

Third, the Convention could enact a more rigorous rule, one which imposes greater restraints than those imposed by Public Law 8-11. One approach under this alternative would be to impose a stricter financial requirement, i.e. lower the allowable financial interest to less than \$5,000. The other approach would be to attempt to reach a "personal interest" such as proposed by Delegate Villagomez. In such case, it is imperative that "personal interest" be clearly defined.

Whatever course the Convention decides upon, it cannot dilute or weaken the standard set by law.