THE NEW YORK ETHICS REVIEW COMMISSION

REVIEW OF THE JOINT COMMISSION ON PUBLIC ETHICS AND THE LEGISLATIVE ETHICS COMMISSION

Report and Recommendations

November 1, 2015

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INTRODUCTION

The New York Ethics Review Commission ("the Review Commission"), commonly referred to as the JCOPE Review Commission was created by Section 21 of Part A of Chapter 399 of the Laws of New York in 2011 as part of the "Public Integrity Reform Act" (PIRA). PIRA established two entities to serve as the ethics bodies for New York State government: the Joint Commission on Public Ethics (JCOPE) and the Legislative Ethics Commission (LEC). The Review Commission was established as an advisory body, to be convened three years after PIRA was enacted, and charged with reviewing and evaluating the activities and performance of both JCOPE and LEC, and to provide recommendations to the Governor and State Legislature. The Review Commission was appointed on May 1, 2015.[1] It is required by law to deliver a report by November 1, 2015.

The Review Commission promptly began its work and conducted outreach to many individuals and organizations, including: JCOPE and LEC members and staff; good government groups; elected and appointed officials; bar associations; and lobbyists. The Review Commission gained insight from the diverse and wide range of opinions and feedback it received. The Review Commission considered the following questions as it undertook its work:

- Whether JCOPE and LEC have established the administrative, investigative, and enforcement operations and staffing, along with the regulations and procedures, necessary to implement Executive Law Section 94 and Legislative Law Section 80;
- Whether the administrative, investigative, and enforcement operations of JCOPE and LEC are adequate to implement and meet the statutory mandates of Executive Law Section 94 and Legislative Law Section 80; and

[1] *See* Appendix G.

- Whether there are any obstacles, legally or practically, to JCOPE and LEC meeting their statutory mandates in a timely and effective manner. If so, to what extent are statutory or regulatory changes needed or recommended?

JCOPE AND LEC BACKGROUND

The Joint Commission on Public Ethics was created with the passage of New York's Public Integrity Reform Act of 2011. JCOPE replaced the New York Commission on Public Integrity (COPI), which was established four years earlier by the Public Ethics Reform Act of 2007. COPI had jurisdiction over the State's executive branch and lobbyists, while another entity, the Legislative Ethics Commission, had exclusive jurisdiction over members of the Legislature and legislative branch employees. PIRA replaced COPI with the newly created JCOPE, and granted it additional investigatory jurisdiction over members of the Legislature and legislative branch employees. However, LEC remained largely intact to serve as the ethics training and advisory body for members and employees of the State Legislature, and retained the sole authority to impose sanctions for ethics violations determined by JCOPE.

PIRA's formal title has likely led to some of the criticisms surrounding the purpose and performance of JCOPE. Based on the Review Commission's reading of the statute, and conversations with JCOPE members and staff, as well as State ethics law experts, JCOPE is most like a *conflicts of interest board*, rather than a public integrity law enforcement agency which would focus exclusively on combatting public corruption, a role which belongs to the Office of the Inspector General, the Office of the Attorney General, and the Office of the U.S. Attorney.[2]

JCOPE is comprised of 14 members. The Governor and Lieutenant Governor appoint six members, the Temporary President of the Senate and the Speaker of the State Assembly appoint three members each, and the Minority Leaders of the Senate and Assembly have one appointment each. At least three JCOPE members appointed by the Governor and Lt. Governor have to be of the major political party of which the Governor and Lt. Governor are not members.

[2] See Richard Rifkin, *What Can Ethics Codes Accomplish*, 74 PUB. ADMIN. REV. 39–40 (2014). (Copy attached hereto in Appendix E.)

The Governor and Lt. Governor must solicit non-binding recommendations from the Attorney General and Comptroller. In addition, the statute provides several restrictions on who may qualify for an appointment.[3]

JCOPE has several primary areas of responsibility. It is charged with administering and interpreting the State's ethics laws not only for over 250,000 public employees (the overwhelming number being officials and employees of the State's operational and administrative departments and agencies), but also for the members of the Legislature and legislative employees, as well as lobbyists and related parties. JCOPE is also responsible for training and dissemination of information regarding ethics laws, and issuing advisory opinions when requested. JCOPE implements the State's financial disclosure and lobbying disclosure programs, including the collection and review of filings by public officials and employees, as well as lobbyists, and makes the filings available for public inspection.

JCOPE is also charged with initiating and conducting investigations to determine if a substantial basis exists to conclude that the State Ethics laws have been violated. If JCOPE concludes at the end of its investigation that ethics laws have been violated, it can take the following actions (which differ depending on which laws have been violated and from which branch of government the subject of the investigation is a member): impose certain civil penalties depending on the ethics law the subject has violated; and in certain cases, refer the subject to their appointing authority for disciplinary action. In the case of a finding of an ethics violation by a legislative branch member or employee, JCOPE refers the findings to LEC. JCOPE may also refer its findings to a prosecutorial agency for further investigation.[4]

[3] N.Y. EXEC. LAW § 94(2).
[4] For more details about penalties to JCOPE investigation outcomes, see N.Y. EXEC. LAW § 94(14)–(14-a).

LEC is comprised of nine members. Four of those members are members of the legislative branch, and the Speaker of the Assembly, Temporary President of the Senate, and the Minority Leaders of both houses each make one of these appointments. The remaining five members of LEC cannot be current or former members of the Legislature, candidates for State legislative office, employees of the legislature, political party chairmen, or lobbyists, and each of the leaders previously listed make one of these remaining appointments, and the final appointment made jointly by the Speaker of the Assembly and the Majority Leader of the Senate.[5]

When LEC receives a determination from JCOPE that a member of the Legislature has breached ethics laws, and LEC has several options to act that include: accepting the determination in full and then proceed to determine penalties; disagreeing in full and stating the reasons why; or, reviewing and sending it back to JCOPE for further follow up. LEC has no independent investigatory powers. As the ethics body for the Legislature, LEC also conducts ethics education and training sessions, and provides advice and guidance when requested.

[5] N.Y. EXEC. LAW § 80(1).

THE REVIEW COMMISSION'S PROCESS

The Review Commission was appointed by the Governor and State Legislative leaders on May 1, 2015. Since then, Review Commission members have met and/or conducted phone calls with a wide variety of stakeholders, experts, and interested parties. The Review Commission was not provided with a dedicated budget line. Accordingly, members themselves performed all of the work of the Review Commission with the help of with volunteer assistance from private individuals. No governmental staff was involved in providing guidance in the Review Commission's work plan or in producing the Review Commission's work product.

To begin its outreach, the Review Commission sent letters soliciting input from a group of good government leaders and ethics experts.[6] The Review Commission also established a website at www.nyethicsreview.org. Following that, meetings were held over several months in New York City, Long Island, Albany, and Buffalo. Some of the individuals and groups with whom the Review Commission spoke included the heads of good government groups including Citizens Union, Common Cause, NYPIRG, the League of Women Voters, members of the City Bar Association Committee on Government Ethics (including a former U.S. Attorney for the Eastern District of New York), and staff of the New York State Bar Association. The Review Commission also met with some JCOPE and LEC members, including the Chairs and key JCOPE and LEC staff, and several attorneys who represent clients before JCOPE. A number of these groups and individuals provided written recommendations and reports.

In addition, JCOPE and LEC provided reports and other documents that were very helpful to the Review Commission, including February 2015 report published by JCOPE which provided a comprehensive review of the State's ethics laws and processes[7]. This input provided

[6] *See* Appendix A.
[7] *See* Appendix G.

many useful perspectives on JCOPE and LEC as well as important recommendations. Review Commission members also met with any individual or organization requesting a meeting, providing them a full opportunity to be heard.

On September 21, 2015, the Review Commission issued a notice regarding Public Hearings to be held in Albany and New York City on October 7 and October 14, respectively. Recipients of the notice included the entire Capital press corps and the aforementioned good government organizations. The notice also was published on the Review Commission's website and in the State Register. As a result, a variety of news outlets published numerous articles about the Review Commission's upcoming work and hearings, giving them statewide publicity. On October 2, in light of an apparent lack of interest by the public in testifying (only two individuals expressed interest in speaking), and with the realization that the hearing would occur at the same time as the JCOPE public meeting (JCOPE originally scheduled its public meeting for September 29 and shortly before it was to occur moved the meeting to October 7), the Albany hearing was cancelled. It is important to note that the Review Commission's chair and several of its members travelled to Albany on September 28 and met with a number of people about JCOPE and LEC.

On October 14, 2015, the Review Commission held its public hearing in New York City. During the hearing, the Review Commission heard testimony from representatives of Citizens Union, Common Cause, Lawyers Alliance for New York, Center for Judicial Accountability, and Evan Davis and Daniel Karson, two members of the City Bar Association's Committee on Government Ethics which, with Common Cause, wrote a very helpful report on JCOPE entitled "Hope for JCOPE." NYPIRG also submitted written testimony. The Review Commission provided to the public a live webcast of the hearing. Following the hearing, there were several

articles published describing the proceedings. Copies of all relevant written materials, including "Hope for JCOPE," submitted to the Review Commission, as well as all news articles, can be found in the Appendix.

After the hearing, several good government groups requested that the Review Commission extend its work beyond the November 1st statutory deadline. They also petitioned State officials for an extension. Although the Review Commission understood the request, it made the determination that it was most appropriate to follow the statutorily prescribed deadline.

REVIEW AND RECOMMENDATIONS

This section outlines the various issues the Review Commission heard about throughout its process. They are organized into nine areas: JCOPE Governance and Operations; Complaint Review and Enforcement; Transparency and Openness; Management and Staffing; Budget; Interpretive Guidance Provided to Public Servants; Training; and, Technology. What follows is a summary of the issues and the Review Commission's recommendations.

JCOPE Governance and Operations

What the Review Commission Heard: The Review Commission heard a number of suggestions related to the composition of JCOPE: (1) streamlining JCOPE to a body of 5, 7, or 9 members[8] because the current number is too large to manage efficiently and to reach quorum without difficulty and to conduct business; (2) revising procedures as to who appoints members, whom should be appointed, and by what processes; (3) barring current elected officials from serving on JCOPE; and (4) erecting a firewall between JCOPE members and their appointing authorities.

The Review Commission's Recommendation: The Review Commission believes that the size and composition of JCOPE is a key governance matter, subject to the legislative process and separation of powers concerns. Therefore, the Review Commission does not believe it should make a prescriptive recommendation. However, based on practical concerns heard by the Review Commission—particularly from both JCOPE members and staff—a smaller body may enable JCOPE to function more nimbly and effectively. Indeed, the Review Commission recognizes the logistical challenges of coordinating a body this large, ensuring it can meet its quorum requirements, and providing ample opportunity for JCOPE members to be heard, and for

[8] For example, New York City's Conflicts of Interest Board is comprised of five members. For details about other jurisdictions, see *Ethics: State Ethics Commissions,* NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/ethics/state-ethics-commissions.aspx (last updated Dec. 2014).

JCOPE to reconcile a wide array of potential viewpoints. These logistical concerns are compounded by the tight timeframes under which JCOPE operates, which make it difficult to schedule meetings.

The Review Commission also believes that the individual appointing authorities to JCOPE should employ selection processes to yield candidates to independently execute the weighty responsibilities held by JCOPE commissioners. In addition, the Review Commission believes that current elected officials who are under the jurisdiction of JCOPE should be barred from serving as members of JCOPE. While the Review Commission understands why the erection of firewalls has been suggested, it believes that the purposes behind these suggestions are best accomplished by JCOPE developing internal guidelines for JCOPE members' conduct in their interactions with public officials and public servants with whom they come into contact in the course of their own public and professional lives, while at the same time having oversight of these same officials and public servants. These internal guidelines should be published for greater transparency, and to raise public confidence in the work of JCOPE.

Complaint Review and Enforcement

***i. Voting and Vetoes*:**

What the Review Commission Heard: JCOPE should be required to publish the roll-call vote tallies regarding substantial basis reports and investigations. The current structure of JCOPE, which allows a minority of members to veto recommendations for investigations, should be changed.

The Review Commission's Recommendation: Currently, JCOPE does not publish a roll-call tally of votes on whether or not to commence an investigation after receipt of a substantial basis report. The Review Commission does not recommend that roll-call tallies of

such votes be published. We believe that doing so would have a chilling effect on the actions of individual JCOPE members. The Review Commission understands the concern that the "minority veto" provision has given rise to the perception that JCOPE is hampered in executing its mission and function. While as a matter of fact the veto has not been routinely used, we agree it creates both a perception issue and potential problem. Therefore, we recommend a legislative change that provides for decision by a simple majority of the total voting body. In the absence of such a provision, we recommend disclosure in the JCOPE Annual Report of the number of cases in which the provision is used each year, as well as the vote tallies in each case without identifying individual JCOPE members and how they voted.

***ii. Timeframes*:**

What the Review Commission Heard: JCOPE should better define the purpose and process for the issuance of a letter to someone against whom a complaint has been lodged, within fifteen days of that complaint. Further, the forty-five day requirement for JCOPE action on a complaint hinders the ability of JCOPE to fully and effectively investigate and consider such complaints. The forty-five day period is viewed as timeframe is too restrictive and as leading to logistical and administrative problems.

The Review Commission's Recommendation: Since the purpose of the 15-day letter merely is to provide notice of a complaint to the subject, the Review Commission recommends that the JCOPE Executive Director be permitted to issue such a letter for that exclusive purpose. The letter should be copied to JCOPE members.

The forty-five day requirement should be modified to permit additional time to prepare, review, and consider complaints. Accordingly, we recommend that JCOPE take action upon

complaints within the time-frame of two meeting cycles, with the ability to extend the time-frame based on good cause.

Transparency and Openness

i. FOIL and Open Meetings

What the Review Commission Heard: JCOPE and LEC should be encouraged to adhere to the Freedom of Information Law and Open Meetings Law.

The Review Commission's Recommendation: The Review Commission recommends that JCOPE and LEC review its statutory obligations when it comes to disclosures under the Freedom of Information Law and the conduct of public business under the Open Meetings Law. The Review Commission acknowledges that State law provides exemptions from certain requirements in recognition of the sensitive nature of the work of JCOPE. However, to bolster the public's faith in the work of both JCOPE and LEC, it is recommended that, absent legislative change, each agency undertake a legal review and attempt to develop policies as to when voluntary disclosures of certain information (salary rosters and budgets for example) by the agency might be appropriate and would not compromise the agency's deliberative functions, the privacy rights of individuals, or be injurious to individuals who may be the subject of complaints or investigations. Similarly, clear policies should be adopted to govern when open meetings will be held, or when closed meetings will be held, consistent with the law.

ii. Disclosures:

What the Review Commission Heard: The various systems for financial and lobbying disclosures are cumbersome, not integrated, and not user friendly. The forms are said to be redundant and lack specificity and clarity in terms of information required. In addition, filers often have to submit multiple forms for the same activity—whether it be financial or lobbying

disclosure at both the New York State and New York City level. It has been suggested that all similar filings be electronic in format and harmonized between the different levels of government so that all similar filings can be done in a single stroke.

The Review Commission's Recommendation: Comprehensive review of all forms should be done to ensure information is consistent with all requirements of the law, and JCOPE should issue guidance with examples for each category to be disclosed. The Review Commission recommends that any duplicate or triplicate filings be eliminated, either through internal administrative action, or through administrative and operational agreements with other entities that have overlapping filing requirements, such as the New York City Lobbying Bureau within the New York City Clerk's Office.

iii. Monetary Expenditure Threshold:

What the Review Commission Heard: The threshold that requires organizations to report lobbying expenditures is too low, therefore causing burdensome requirements for small organizations to file and for JCOPE to process and verify. The threshold of $5,000 was recommended to be raised to $10,000.

The Review Commission's Recommendation: JCOPE staff should undertake a review of filings by entities reporting small lobbying expenditures, for example, expenditures of less than $10,000, to attempt to evaluate whether the usefulness of the information received outweighs the administrative burden on both small reporting entities and the JCOPE staff. If the results yielded by the review show that the usefulness is outweighed by the burden to JCOPE and its filers, the Review Commission recommends that the threshold be raised to $10,000.

Management and Staffing

What the Review Commission Heard: Staffing and personnel at JCOPE should be bolstered by beginning searches for the executive director and other staff with public job listings. The JCOPE executive director should be empowered to hire staff, without micromanagement by JCOPE members.

The Review Commission's Recommendation: The Review Commission is aware of the intense public dialogue in recent months about the selection of a new Executive Director for JCOPE. It also understands that JCOPE has had an internal dialogue over the matter and is now conducting broad outreach to identify candidates. The Review Commission recommends that JCOPE utilize all appropriate means to advertise for all available positions, including that of the executive director, and solicit input and recommendations from all appropriate parties and organizations about potential candidates. JCOPE should formally establish an internal governance policy that reflects its hiring policies and other administrative and decision making processes and that also allows the executive director to manage all staff functions as contemplated by statute and to implement the determinations of JCOPE as a body. This policy should be posted on the JCOPE website. Further, to ensure the public's confidence in the independence of JCOPE, the agency should take steps to avoid any appearance of interference by any of its appointing authorities in the hiring of the executive director or staff.

Budget

What the Review Commission Heard: JCOPE and LEC should be provided with budgets that link its appropriations to the appropriations of another state agency or public entity.

This would ensure that elected officials, who are regulated by JCOPE or LEC, cannot target them for budget cuts as a means of affecting the performance of its duties.

The Review Commission's Recommendation: The Review Commission believes that in order to have a well-functioning public ethics agency, adequate funding must be provided. However, the Review Commission also believes that a determination of what constitutes adequate funding should not be based on a statutorily prescribed formula. Instead, it should be determined through a public process where elected officials are held publicly accountable for their budgetary decisions through vigorous oversight and scrutiny by watchdogs. Accordingly, the Review Commission does not recommend an independent budget for JCOPE or LEC tied to another state agency or public entity. The Review Commission not only disagrees with this approach as a matter of responsible governance, but also because, when taken to its logical conclusion, tying JCOPE's or LEC's budget to that of another agency could potentially, in certain circumstances, result in a funding decrease for JCOPE or LEC.

Interpretive Guidance Provided to Public Servants

(i) Timeliness

What the Review Commission Heard: When JCOPE issues advisory opinions to individuals seeking private guidance, they should do so with shorter response times.

The Review Commission's Recommendation: The Review Commission recommends that JCOPE ensure all appropriate steps are taken to provide guidance to individuals about particular circumstances as quickly as possible. Doing so will ensure that public officials and other employees will be able to step forward confidently without the risk of unknowingly violating ethics laws. The Review Commission notes that additional staff being hired by JCOPE should allow for more efficient agency operations.

(ii) Clarification of Rules

What the Review Commission Heard: JCOPE should improve guidance to elected officials regarding ethics requirements, by clarifying requirements set forth in ethics legislation and regulations, which may be interpreted differently by JCOPE and LEC, and thus confuse attempts to comply with the law. Among the issues reported to the Review Commission were requests that JCOPE publicly issue more formal advisory opinions (they have only issued four since inception), and that they improve guidance to lobbyists regarding spending, by clarifying what is public education, advertising, or advocacy—including grassroots lobbying.

The Review Commission's Recommendation: The Review Commission agrees that JCOPE and LEC should make all efforts to harmonize and expand as much as possible the interpretative guidance provided to elected officials and other public servants on the requirements of existing legislation and regulations. [9] Clear and accessible training programs, both live and online, should be developed to correspondingly educate public servants about the law.

(iii) Reluctance to Seek Advice from JCOPE

What the Review Commission Heard: There is reluctance by some to contact JCOPE for advice and guidance on ethics and conflicts questions due to a perception that there is no separation between the advice and enforcement staff.

The Review Commission's Recommendation: The Review Commission believes it is imperative that those under the jurisdiction of JCOPE feel unencumbered in seeking guidance

[9]The Review Commission acknowledges the proposed rule issued by JCOPE recently that addresses some of these issues by proposing a ban on elected officials soliciting campaign contributions from those subject to their enforcement oversight and the Review Commission encourages more such reviews of old rules and development of new ones. *See Advisory Opinion No. 15-0X, Whether an elected official may solicit and accept campaign contributions or other forms of support for his political campaign from a subject of the official's enforcement powers*, Joint Commission on Public Ethics. <http://www.jcope.ny.gov/advice/proposed%20regs/2015-10-27-Proposed%20AO%20Elected%20Officials.pdf>

and advice from JCOPE. The Review Commission recommends that the advice and enforcement staffs be separated as means to spur more individuals under the jurisdiction of JCOPE to seek advice without feeling such requests could become the unwarranted subject of an investigation or enforcement activity.

Training

What the Review Commission Heard: JCOPE should enhance the accessibility, frequency, and substance of their ethics trainings for State workers and lobbyists. The training programs are currently more focused on the basic elements of what the ethics laws currently are and what the violations are for not complying. JCOPE would be much more effective if it contributed substantively to enhancing the overall culture of ethics in State government. JCOPE needs to develop multi-faceted trainings, which in turn would alleviate many of the ethical quandaries state government workers face at the outset, and therefore avoid the need for later investigations and penalties. While JCOPE has developed an online training course, JCOPE has been urged to have an understandable and detailed handbook that can provide answers to many questions State workers and lobbyists may have. Another recommendation has been to drill down on certain parts of ethics laws to ensure State officials have a more definitive understanding of what is and is not permissible conduct. It has also been suggested that JCOPE provide more information, interpretations, and technical assistance on all ethics laws through online tools available to it including: FAQs, hypotheticals, and examples, including any relevant rulings or advisory opinions.

The Review Commission's Recommendation: The Review Commission believes that JCOPE needs to be much more proactive in training and outreach and provide as much material as possible to help both State officials and lobbyists understand their obligations under State

ethics laws and how to avoid conflicts before they ever arise. The Review Commission acknowledges that JCOPE understands this and is in the process of enhancing their training materials, but the Review Commission believes a number of consideration and actions should be incorporated into that work. To that end, JCOPE should consider dedicating staff, possibly as a working group in partnership with outside experts, to develop engaging online training courses and written guidelines that would provide up-to-date hypotheticals reflecting realistic situations state workers and lobbyists encounter. JCOPE should be more creative and proactive in communications it sends out, and develop new mechanisms for engagement. One example it should look at is the social media engagement of the New York City Conflicts of Interest Board, which has drawn a lot of attention for its unique use of Twitter. While online training is the most practical way to ensure that full training compliance is met, JCOPE needs to conduct more robust direct outreach. They have conducted roundtables to discuss new regulations and new registration tools with their constituencies, so they already have an outreach model that could be expanded to do trainings. JCOPE should hold in person sessions upstate and downstate every year where they conduct trainings for those who can come in and simultaneously webcast to employees around the State. These training sessions, along with the regular online training and other guidance materials, should be subject to feedback from participants to inform how to better refine and improve utility of the materials. Training is generally one of the areas JCOPE can do much to enhance, without any statutory changes, and have a significant impact on the culture of ethics in State government. We note that Executive Order 3 of 2011[10] mandates ethics training for certain State employees. JCOPE should do what it can to ensure the broadest range of training for all State employees under its jurisdiction regardless of the branch of government where they are employed.

[10] Executive Order No. 3, January 2, 2011. <https://www.governor.ny.gov/news/no-3-ethics-training>

Technology

What the Review Commission Heard: JCOPE should further invest in information technology, most notably its website and databases, to ensure more robust data collection and to allow for meaningful analysis and oversight of lobbyists and officials.

The Review Commission's Recommendation: The Review Commission found that JCOPE is in the process of making significant strides to improve its technological platforms and to ensure that a more integrated public interface is available. The Review Commission believes JCOPE has recently been given the resources to make effective changes and supports their ongoing efforts to do so. The Review Commission recommends that JCOPE work closely with the individuals and entities under its jurisdiction, as well as the good government community and the public at large, to ensure the implementation of a user-friendly, meaningful, and transparent interface for its activities and the activities of those it regulates. JCOPE must provide users with an interface that allows data to be searchable, downloadable, and linked to other sources.

FUTURE CONSIDERATIONS AND CONCLUSION

Future Considerations

The Review Commission heard a multitude of both broad ideas and highly detailed suggestions for ethics reform and initiatives that it believed were outside the scope of its mandate. Nonetheless, the Review Commission closely reviewed them and believes that many of them are worthy of future consideration. Many of these suggestions are contained in the reports and testimony of good government reports that the Review Commission has received. These documents can be found in the Appendix to this report, and the Review Commission believes that they should serve as roadmap to shape the contours of future discussions and appropriate reform activity. These issues include whether having a full-time legislature would reduce instances of corruption; whether, the ethics statute should include a mandatory reporting requirement of alleged unethical conduct similar to the requirement in the Inspector General statute; and following this, whether existing statutes adequately protect whistleblowers who report alleged violations to JCOPE; whether a restriction on the ability of legislators and legislative staff to serve on boards of non-profit organizations that receive funding from the State of New York is desirable; whether JCOPE should be granted complete hearing and enforcement authority over all parties subject to its regulation in order to fulfill the purpose of a Joint Commission over both branches of State government; and, whether due process protections should be clarified so all parties subject to JCOPE enforcement are treated equally.

Conclusion

The Review Commission strongly urges that the recommendations and issues outlined in this report be used to promptly begin a substantive and serious dialogue both within JCOPE and LEC and their appointing authorities. JCOPE has an essential mission to educate those who are

part of, or interact with, State government on conflicts of interest and thereby help prevent them. The Review Commission acknowledges the great work done by many good government groups, and believes that their work, coupled with the recommendations contained herein, provide the roadmap for improving and enhancing the State's goals of having the most ethical elected officials and workforce possible.[11]

[11] The Commission wishes to thank Ariel Dvorkin and Jonathon Sizemore who volunteered and provided , invaluable assistance with the work of the Commission. Mr. Dvorkin is a member of the New York Law School staff and provided coordination, policy, research, and policy communications expertise. Mr. Sizemore is a third year law student and Executive Editor of the New York Law School Law Review.

Appendix

A. Example of Letter from Review Commission Soliciting Comments from Ethics Experts, July 30, 2015 and List of to Whom It Was Sent
B. Public Notices For Public Comment and Public Hearings
C. State Register Notices
D. List of Those Who Testified at Public Hearing on October 14, 2015
E. Testimonies, Reports, and Other Written Materials Submitted
F. Articles Regarding Review Commission's Work
G. Press Release Announcing Review Commission Formation and Members

Appendix A

Example of Letter from Review Commission Soliciting Comments from Ethics Experts, July 30, 2015 and List of to Whom It Was Sent

NEW YORK ETHICS REVIEW COMMISSION

57 Worth Street, E216
New York, NY 10013

T 212.324.7959
E admin@nyethicsreview.org
www.nyethicsreview.org

July 30, 2015

[Name]
[Organization]
[Address]

Dear [Name]:

As you know, the Review Commission to review and evaluate the activities and performance of the New York State Joint Commission on Public Ethics and the Legislative Ethics Commission has been appointed.

On behalf of the Commission, we are asking you to please send us any information that you believe would be helpful to our review by August 31, 2015. Information may be sent via email to admin@nyethicsreview.org or by U.S. mail to:
Ethics Review Commission
c/o 57 Worth Street, E216
New York, NY 10013

If you have any questions, please contact Ariel Dvorkin, Coordinator, at (212) 324-7959. Thank you.

Sincerely,

Anthony W. Crowell
Member

Patricia Salkin
Member

Mr. Dick Dadey
Executive Director
Citizens Union
299 Broadway, Suite 700
New York, New York 10007
(212) 227-0342

Mr. Blair Horner
Legislative Director
New York Public Interest Research Group
107 Washington Avenue
Albany, NY 12210
(518) 436-0876

Mr. Michael Waldman
President
Brennan Center for Justice
161 Avenue of the Americas, 12th Floor
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(212) 998-6731

Ms. Susan Lerner
Executive Director
Common Cause New York
80 Broad Street, Suite 2703
New York, NY 10004
(212) 691-6421

Ms. Barbara Bartoletti
Legislative Director
League of Women Voters of New York State
62 Grand Street
Albany, NY 12207
(212) 382-6700

The Honorable Ellen Biben
Judge
New York State Court of Claims
26 Broadway
New York, NY 10004

Mr. Karl J. Sleight
Member
Harris Beach PLLC
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Saratoga Springs, NY 12866

Mr. Seth Agata
Chair
New York Public Employee Relations Board
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Agency Building 2, Floors 18 & 20
Albany, New York 12220

Mr. Barry Ginsberg
Chief Risk Officer/Deputy Commissioner
of Criminal Enforcement
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Special Counsel/Senior Director
New York State Bar Association
One Elk Street
Albany, NY 12207

Mr. Mark Davies
Executive Director
New York City Conflicts of Interest Board
2 Lafayette Street
New York, NY 10007

Mr. Evan A. Davis
Senior Counsel
Cleary Gotlieb
One Liberty Plaza
New York, NY 10006

Mr. Jeremy Feigelson
Partner
Debevoise & Plimpton LLP
919 Third Avenue
New York, NY 10022

Appendix B

Public Notices

1. Public Notice Soliciting Comment, July 30, 2015

2. Public Hearings Notice, September 22, 2105

3. Public Hearing Notice, October 2, 2015

NEW YORK ETHICS
REVIEW COMMISSION

57 Worth Street, E216
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NOTICE FOR PUBLIC COMMENT

The New York Ethics Review Commission is Issuing a Request for Public Comment on the activities and performance of the New York State Joint Commission on Public Ethics and the Legislative Review Commission.

Comments should be submitted no later than August 31, 2015.

Comments can be submitted via email to admin@nyethicsreview.org, or sent via US Mail to:
Ethics Review Commission
c/o 57 Worth Street, E216
New York, NY 10013

NEW YORK ETHICS
REVIEW COMMISSION

57 Worth Street, E210
New York, NY 10013

T 212.324.7959
E admin@nyethicsreview.org

NOTICE OF PUBLIC HEARINGS FOR OCTOBER 2016

The New York Ethics Review Commission (a.k.a. JCOPE Review Commission) is holding two public hearings, one in Albany and one in New York City, in October in order to receive public comments on the Joint Commission on Public Ethics and the Legislative Ethics Commission.

October 7, 2015

- **Location:** Albany Law School, 80 New Scotland Ave, Albany, NY 12208.
- **Time:** 11 a.m. – 3 p.m.

October 14, 2015

- **Location:** New York Law School, 185 West Broadway, New York, NY 10013
- **Time:** 11 a.m. – 2 p.m.

In order to accommodate everyone who wishes to be heard, the public is encouraged to sign up in advance at admin@nyethicsreview.org, or written testimony can be submitted in lieu of appearing at the hearing.

From: admin@nyethicsreview.org [mailto:admin@nyethicsreview.org]
Sent: Friday, October 02, 2015 3:58 PM
Subject: Public Hearing Notice and Update

Please be advised that the New York Ethics Review Commission (also known as the JCOPE Review Commission), chaired by Senator Dale Volker (Ret.) has cancelled its hearing on October 7 in Albany. The Commission will proceed with the public hearing on October 14, with details below. If anyone intended to appear before the Commission on October 7, they are encouraged to submit appear at the hearing in New York City, or submit written testimony to admin@nyethicsreview.org.

NOTICE OF PUBLIC HEARING FOR OCTOBER 2016

The New York Ethics Review Commission (a.k.a. JCOPE Review Commission) is holding a public hearing in New York City this month in order to receive public comments on the Joint Commission on Public Ethics and the Legislative Ethics Commission.

October 14, 2015

- **Location:** New York Law School, 185 West Broadway, New York, NY 10013
- **Time:** 11 a.m. – 2 p.m.

In order to accommodate everyone who wishes to be heard, the public is encouraged to sign up in advance at admin@nyethicsreview.org, or written testimony can be submitted in lieu of appearing at the hearing.

Appendix C

State Register

1. ***Public Notice for Comments***
2. ***Public Notice for Hearings***

MISCELLANEOUS NOTICES/HEARINGS

Notice of Abandoned Property Received by the State Comptroller

Pursuant to provisions of the Abandoned Property Law and related laws, the Office of the State Comptroller receives unclaimed monies and other property deemed abandoned. A list of the names and last known addresses of the entitled owners of this abandoned property is maintained by the office in accordance with Section 1401 of the Abandoned Property Law. Interested parties may inquire if they appear on the Abandoned Property Listing by contacting the Office of Unclaimed Funds, Monday through Friday from 8:00 a.m. to 4:30 p.m., at:

1-800-221-9311
or visit our web site at:
www.osc.state.ny.us

Claims for abandoned property must be filed with the New York State Comptroller's Office of Unclaimed Funds as provided in Section 1406 of the Abandoned Property Law. For further information contact: Office of the State Comptroller, Office of Unclaimed Funds, 110 State St., Albany, NY 12236.

PUBLIC NOTICE
New York Ethics Review Commission

The New York Ethics Review Commission is Issuing a Request for Public Comment on the activities and performance of the New York State Joint Commission on Public Ethics and the Legislative Review Commission.

Comments should be submitted no later than August 31, 2015.

Comments can be submitted via email to admin@nyethicsreview.org, or sent via US Mail to: Ethics Review Commission, c/o 57 Worth St., E216, New York, NY 10013

PUBLIC NOTICE
Office of General Services

Pursuant to Section 33 of the Public Lands Law, the Office of General Services hereby gives notice to the following:

Notice is hereby given that the New York State Office of Alcoholism and Substance Abuse Services has declared that 849 Crotona Park North, located in New York State, the City of New York, County of Bronx, Borough of Bronx is no longer useful for State program purposes and has been declared abandoned to the Commissioner of General Services for sale or other disposition as unappropriated State land. The property is identified as Block 2957, Lot 15, Bronx County and is improved with a 3 story, plus basement level, building.

For further information, contact: Thomas Pohl, Esq., Office of General Services, Legal Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-2195, (518) 474-0011 (fax)

PUBLIC NOTICE
Office of General Services

Pursuant to Section 33 of the Public Lands Law, the Office of General Services hereby gives notice to the following:

Notice is hereby given that the New York State Office of Alcoholism and Substance Abuse Services has declared that 1790 Marmion Avenue, located in the City of New York, New York State, County of Bronx, Borough of Bronx is no longer useful for State program purposes and has been declared abandoned to the Commissioner of General Services for sale or other disposition as unappropriated State land. The property is identified as Block 2957, Lot 19, Bronx County and is improved with a 3 story, plus basement level, building.

For further information, contact: Thomas Pohl, Esq., Office of General Services, Legal Services, 41st Fl., Corning Tower, Empire State Plaza, Albany, NY 12242, (518) 474-2195, (518) 474-0011 (fax)

PUBLIC NOTICE
Department of Health

Pursuant to 42 CFR Section 447.205, the Department of Health hereby gives public notice of the following:

The Department of Health proposes to amend the Title XIX (Medicaid) State Plan for institutional services to comply with enacted statutory provisions. The following changes are proposed:

Institutional Services

The following is a clarification to the October 29, 2014 and February 25, 2015 noticed provisions for institutional temporary rate adjustments provided to the Mount Sinai Hospitals Groups. The temporary rate adjustment for an aggregate payment amount of $81,400,000 will be paid to Beth Israel Medical Center, not Mount Sinai Hospital for the periods of November 1, 2014 through March 31, 2017. There is no additional estimated annual change to gross Medicaid expenditures as a result of the clarifying proposed amendments.

The public is invited to review and comment on this proposed State Plan Amendment. Copies of which will be available for public review on the Department's website at http://www.health.ny.gov/regulations/state_plans/status.

Copies of the proposed State Plan Amendments will be on file in each local (county) social services district and available for public review.

For the New York City district, copies will be available at the following places:
New York County
250 Church Street
New York, New York 10018

Queens County, Queens Center
3220 Northern Boulevard
Long Island City, New York 11101

Kings County, Fulton Center
114 Willoughby Street
Brooklyn, New York 11201

Bronx County, Tremont Center
1916 Monterey Avenue
Bronx, New York 10457

Richmond County, Richmond Center
95 Central Avenue, St. George
Staten Island, New York 10301

MISCELLANEOUS NOTICES/HEARINGS

Notice of Abandoned Property Received by the State Comptroller

Pursuant to provisions of the Abandoned Property Law and related laws, the Office of the State Comptroller receives unclaimed monies and other property deemed abandoned. A list of the names and last known addresses of the entitled owners of this abandoned property is maintained by the office in accordance with Section 1401 of the Abandoned Property Law. Interested parties may inquire if they appear on the Abandoned Property Listing by contacting the Office of Unclaimed Funds, Monday through Friday from 8:00 a.m. to 4:30 p.m., at:

1-800-221-9311
or visit our web site at:
www.osc.state.ny.us

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NOTICE OF PUBLIC HEARING

New York Ethics Review Commission

The New York Ethics Review Commission (a.k.a. JCOPE Review Commission) is holding two public hearings, one in Albany and one in New York City, in October in order to receive public comments on the Joint Commission on Public Ethics and the Legislative Ethics Commission.

October 7, 2015

- Location: Albany Law School, 80 New Scotland Ave, Albany, NY 12208.
- Time: 11 a.m. – 3 p.m.

October 14, 2015

- Location: New York Law School, 185 West Broadway, New York, NY 10013
- Time: 11 a.m. – 2 p.m.

In order to accommodate everyone who wishes to be heard, the public is encouraged to sign up in advance at admin@nyethicsreview.org, or written testimony can be submitted in lieu of appearing at the hearing.

PUBLIC NOTICE

Department of Civil Service

PURSUANT to the Open Meetings Law, the New York State Civil Service Commission hereby gives public notice of the following:

Please take notice that the regular monthly meeting of the State Civil Service Commission for October 2015 will be conducted on October 20 and October 21 commencing at 10:00 a.m. This meeting will be conducted at NYS Media Services Center, Suite 146, South Concourse, Empire State Plaza, Albany, NY.

For further information, contact: Office of Commission Operations, Department of Civil Service, Empire State Plaza, Agency Bldg. One, Albany, NY 12239, (518) 473-6598

PUBLIC NOTICE

Susquehanna River Basin Commission

Actions Taken at September 10, 2015, Meeting

SUMMARY: As part of its regular business meeting held on September 10, 2015, in Binghamton, New York, the Commission took the following actions: 1) approved or tabled the applications of certain water resources projects; 2) approved a request from Panda Power Funds for transfer of ownership of Hummel Station LLC; 3) accepted a settlement in lieu of penalty from Downs Racing L.P.; and 4) took additional actions, as set forth in the Supplementary Information below.

DATES: September 10, 2015.

ADDRESSES: Susquehanna River Basin Commission, 4423 N. Front Street, Harrisburg, PA 17110-1788.

FOR FURTHER INFORMATION CONTACT: Jason E. Oyler, General Counsel, telephone: (717) 238-0423, ext. 1312; fax: (717) 238-2436; e-mail: joyler@srbc.net. Regular mail inquiries may be sent to the above address. See also Commission website at www.srbc.net.

SUPPLEMENTARY INFORMATION: In addition to the actions taken on projects identified in the summary above and the listings below, the following items were also presented or acted upon at the business meeting: 1) adoption of revisions to Resolution No. 2013-11; 2) release of proposed rulemaking to address shortcomings in the rules for transfer of approvals, create a category for minor modifications, establish a procedure for issuing general permits, and address other minor enhancements; 3) adoption of amendment of the Comprehensive Plan for the Water Resources of the Susquehanna River Basin; 5) approval of grants; 6) a report on delegated settlements with the following project sponsors, pursuant to SRBC Resolution 2014-15: Aqua Pennsylvania, Inc., in the amount of $6,000; Conyngham Borough Authority, in the amount of $5,000; Keister Miller Investments, LLC, in the amount of $2,000; Susquehanna Gas Field Services, LLC, in the amount of $2,500; and Wynding Brook, Inc. d/b/a Wynding Brook Golf Club, in the amount of $5,000; and 7) approval to extend the term of emergency certificates with Aqua Pennsylvania, Inc. to September 1, 2016, and with Furman Foods, Inc. to December 3, 2015.

Compliance Matter:

The Commission approved a settlement in lieu of civil penalty for the following project:

1. Downs Racing L.P., Plains Township, Luzerne County, Pa. - $25,000.

Project Applications Approved:

The Commission approved the following project applications:

1. Project Sponsor and Facility: Caernarvon Township Authority, Caernarvon Township, Berks County, Pa. Groundwater withdrawal of up to 0.673 mgd (30-day average) from Well 7.

2. Project Sponsor and Facility: Chetremon Golf Course, LLC, Burnside Township, Clearfield County, Pa. Consumptive water use of up to 0.200 mgd (peak day).

3. Project Sponsor and Facility: Chetremon Golf Course, LLC (Irrigation Storage Pond), Burnside Township, Clearfield County, Pa. Surface water withdrawal of up to 0.200 mgd (peak day).

4. Project Sponsor and Facility: Chief Oil & Gas LLC (Loyalsock

Appendix D

List of Those Who Testified at Public Hearing on October 14, 2015

Those Who Provided Testifimony at Public Hearing on October 14, 2015

1. Evan Davis, New York City Bar Association
2. Daniel Karson, New York City Bar Association
3. Laura Abel, Lawyers Alliance for New York
4. Talia Weber, Citizens Union
5. Elaine Sassower, Center for Judicial Accountability
6. Prudence Katze, Common Cause of New York
7. Blair Horner, NYPIRG (submitted written testimony)

Appendix E

Testimonies, Reports and Other Written Materials Submitted

NEW YORK CITY BAR

CONTACT
MARIA CILENTI
SENIOR POLICY COUNSEL
212.382.6655 | mcilenti@nycbar.org

PREPARED PRELIMINARY STATEMENT IN CONNECTION WITH THE TESTIMONY OF EVAN DAVIS AND DAN KARSON ON BEHALF OF THE NEW YORK CITY BAR ASSOCIATION

NEW YORK ETHICS REVIEW COMMISSION HEARING
OCTOBER 14, 2015
NEW YORK LAW SCHOOL
185 WEST BROADWAY, NEW YORK, NY 10013

On March 14, 2014 the New York City Bar Association in partnership with Common Cause New York issued a Report entitled *Hope for JCOPE.*[1] Immediately following the appointment of this Review Commission we sent each member of the Commission a copy of our report together with a request for public hearings. We are very pleased and grateful that the Commission has decided to hold public hearings and has included our participation. We are also eager to answer any questions about our report and its recommendations.

Since 2010, 13 state senators and Assembly members have been convicted of crimes of corruption or dishonesty.[2] In other cases where criminal charges were not brought but where misconduct occurred, one Assembly member was spared prosecution in exchange for testimony; one resigned his seat, one was stripped of his party leadership position; and one resigned before charges were brought. On top of these cases, the former Assembly Speaker and the former Senate majority leader have been indicted and are awaiting trial. And there have been published media reports that additional legislative members are under investigation.

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[1] "Hope for JCOPE" Report of the New York City Bar Association and Common Cause/New York, March 14, 2014, *available at* http://www2.nycbar.org/pdf/report/uploads/Hope-for-JCOPE-Report.pdf (a copy is attached as Exhibit 1).

[2] See Exhibit 2.

Clearly, neither JCOPE nor its predecessor commission has had the deterrent or preventative effect that the public should expect from a body charged with an anti-corruption mission.

We believe that JCOPE's composition - the way its members are chosen by law, the way its staff has been chosen, and the rules under which it operates by law - fails to instill in officeholders, much less the public, any serious confidence or concern that JCOPE can or will deter, uncover or punish unethical or criminal conduct.

We cannot of course speculate as to what thought any of the convicted legislators gave to JCOPE, or for that matter, any law enforcement agency. However, given the number of legislators investigated, charged and/or convicted just during JCOPE's short existence, we think it a fair inference that JCOPE either was of little concern, or was all but invisible to them.

To be effective, an anti-corruption and ethics chartered body must have the following constituents:

- It must be independent and apolitical, and while its members and staff may be appointed by elected officials, those officials must appoint and empower the body with a clear mandate to be independent and apolitical

- It must be empowered to function without the veto or legal restraint of a minority

We have encountered those who sincerely believe that the best way to encourage public confidence in government is to play down vigorously seeking out and calling public attention to unethical behavior. They see vigorous ethics enforcement as a counter-productive idea that will only encourage public cynicism. According to this view, most public officers are ethical and to highlight the bad apples will unfairly tarnish the reputation of the ethical public servants and discourage good people from entering public service.

We believe that vigorous ethics enforcement is in both the public interest and the interest of the many, many public servants who obey the law. This result is particularly clear when far too often it is elected officials who are breaching the public trust and bringing government as a whole into disrepute. Misconduct by an elected official is, and in a democracy should be, a matter of political and electoral consequence. Therefore we need ethics machinery that will proceed independently, vigorously and fairly with complete indifference to those political and electoral consequences.

Thus two major concerns underlie our Report. The first is concern over JCOPE's lack of both actual and perceived independence. JCOPE must be structured with safeguards that will give the public confidence that JCOPE will interpret and enforce ethics and lobbying rules without regard to political consequences. Those safeguards can be provided by Commission procedures that insulate commission members from political influences, and by transparency that both enables public scrutiny of JCOPE's decision making process and provides fairness because the Commission is indifferent to irrelevant political consequences. Our Report concludes that these safeguards are wanting in the case of JCOPE.

The second major concern of our Report is JCOPE's lack of vigor in the face of an urgent need to strengthen Albany's commitment to high ethical standards. Ethics is the first line of defense against public corruption, and to be effective JCOPE must demonstrate initiative. Our Report concludes that JCOPE has failed to take a large number of needed remedial actions that it is empowered to take under current law. While we are aware that JCOPE has taken some steps to improve its operations and extend its reach, we believe far more must be done. We have identified the steps we believe JCOPE can take right now, without legislative action, as well as necessary legislative amendments, in a chart attached to our testimony.[3] This chart shows a comparison between JCOPE's proposals for reform made in its mandated report to the Legislature and the proposals in our Report, which are for the most part actions we believe JCOPE can take on its own initiative and without the need for new legislation. It is unfortunate in our view that JCOPE has largely chosen to seek unnecessary new authority rather than to use its existing authority under the State Code of Ethics in a robust and purposive manner.

[3] See Exhibit 3. See also excerpted list of recommendations from "Hope for JCOPE" report attached as Exhibit 4.

We do not plan to review all of our recommendations here but are ready to answer questions as to any of them. Rather Mr. Davis will highlight two – our recommendation that the Commission construe the phrase "breach of public trust" in the State Ethics Law to include a failure to report misconduct and our recommendation that the Commission issue guidance on how to manage the conflict of interest that arises when officials make decisions that directly affect large campaign contributors. Mr. Karson will highlight two others – our proposal for legislative change to make the Commission more independent and our proposal to bar an affiliation that carries any influence over employment, grant making or other financial decisions between elected officials and their staff and families and non-profit entities receiving state funding.

Finally, some of our proposals will require additional funding. For example an improved website where who is lobbying whom about what, together with the campaign contributions that accompany that lobbying, can be discovered with the push of a button, and an ethics awareness campaign to get the message across clearly to state offices with calls to ethical behavior. The New York City Bar Association would actively support such additional funding.

New York
COMMON CAUSE
Holding Power Accountable

Testimony by
Prudence Katze, Research and Policy Manager of Common Cause/New York

Before the
JCOPE Review Commission Hearing

Regarding
Joint Commission on Public Ethics and the Legislative Ethics Commission
October 14, 2015

Good morning members of the Review Commission. Thank you for the opportunity to speak today. My name is Prudence Katze, and I am the Research and Policy Manager of Common Cause/New York. Common Cause/NY is a non-partisan, non-profit citizens' that fights to strengthen public participation and faith in our institutions of self-government and to ensure that government and political processes serve everyone's interest, and not simply the special interests. Common Cause has consistently spoken out on the need for greater government transparency, and has long advocated for ethics reform in the State of New York.

Evan Davis and Dan Karson of the New York City Bar Association outlined our concerns in regard to JCOPE's lack of independence and those concerns are described in more detail in the 2014 "Hope for JCOPE" that was written by Common Cause / NY and the New York City Bar Association.

We acknowledge that JCOPE's lack of resources and staffing has made it difficult to modify its data collection and reporting to keep up with 21st century standards. However, we feel that JCOPE has not fully utilized its rule-making authority to insure that the information which it gathers and makes available to the public is as useful and meaningful as it could be. We hope that the JCOPE Review Commission will take this opportunity to urge a more proactive rule-making posture by JCOPE to take full advantage of its ability to provide guidance and require standardized reporting. Such proactive rule-making will not only facilitate easier reporting by lobbying entities but make the data provided easier for the public to understand. In addition to this testimony, which will detail my experiences in both helping prepare Common Cause/NY's lobbying disclosures but also our extensive experience in utilizing the online lobbying data provided by JCOPE, I am also providing copies of Common Cause NY's 2013 report "It's All Politics: New York as a Case Study in the Evolution and Campaign Finance"

We are going to go into more detail regarding:

Grassroots lobbying

Problem: Political spending is now often done through a myriad of different streams, yet reporting requirements are uneven and confusing.

Recommendation: Common Cause/NY was pleased to see JCOPE begin to address this issue with proposed regulations dealing with grassroots lobbying earlier this year. We commented about changes

which we believe should be made in the proposed regulation within the comment time period. We believe that JCOPE should expand its regulatory guidance in this area to keep up with ever evolving lobbying activities. In particular, we believe that specific guidance should be given as to how grassroots lobbying expenditures, which in some cases total millions of dollars, should be reported in a standardized format that insures that JCOPE and the public are receiving information in its clearest and most useful form about this area where lobbying expenditures are growing exponentially. We refer the review commission to our "It's All Politics" report for a more detailed discussion of our analysis of changes in lobbying activities and recommendations for regulatory and statutory responses to this changing landscape.

Website

Problem: Website is unwieldly and confusing

Recommendation: Utilize existing resources, such as the AG's NYOpengovernment.com, to create a streamlined tool for disclosure. The website on which lobbying disclosures are made available to the public should present the information in a form that: a) is fully searchable, b) downloadable in formats used by common spreadsheet and data programs, c) permits cross-reference, and d) is user-friendly.

JCOPE's current website is clunky – to say the least, and it is difficult to utilize and fully evaluate the information that is there. We strongly recommend coordination between the different agencies which are reporting various types of political spending, so that ultimately a member of the public can get a clear total picture of how a particular entity or individual is using political money, including lobbying expenditures, to try and influence public policy. As our report makes clear, it is Common Cause/NY's position that the current reality takes advantage of historical legal and regulatory differentiations between campaign and lobbying expenditures to obscure the full scope of political spending to gain access and influence. While a full solution would take legislative action, there is much that JCOPE could do. To that end, we would like to see JCOPE working with the AG, the Comptroller and BoE to coordinate how individuals and entities are identified in the various disclosures and websites these entities maintain to facilitate cross-agency comparisons and aggregation.

JCOPE said they would have a website redesign in 2015 – what is the status on that? What process for involving the end users of the website – reporting entities and those who analyze and use the data presented? Processes designed without the input of end users tend to miss the mark and require costly changes after the fact. For instance, the current website does not aggregate the semi-monthly disclosure statements of entities which are both registered lobbyists and clients, requiring each entity so designated to re-key in all of the data previously entered in each bimonthly report. This introduces the regular possibility of human error causing an unnecessary and inadvertent discrepancy between the bimonthly reports and the bi-annual. Technology has a simple solution for such a common problem, yet the existing website does not provide it.

Source of Funding Disclosure

Problem: JCOPE's current Funder Disclosure Mandate is unclear

Recommendation: Expand the reporting requirements to 501(c)3 organizations, eliminate the "pass-through" loophole by requiring all major entities involved in a multi-layered lobbying structure to report their spending.

Unless steps are taken to require proper disclosures and transparency of third-party coalition campaigns, voters will find themselves ever more confused, misled, and excluded from meaningful political participation. New York took an initial important step to mandate disclosure of the funders behind these veiled lobbying actors when a 2012 Lobbying Act amendment mandated 501(c)4 organizations who lobby on behalf of themselves and who spend more than $50,000 on lobbying activity in New York State make publically available each source of funding that exceeds $5,000 for such lobbying.

Families for Excellent Schools: An Example of Potential Disclosures Slipping Through the Cracks

But the requirements for disclosure is still confusing and it enforcement mechanisms are also vague: this is a statutory and regulatory problem. For example, 501(c)3 organizations such as Families for Excellent Schools (FES) are spending exorbitant amounts of money on lobbying. In 2014, FES spent $9.6 million on lobbying, yet has not disclosed any of its donors. In FES's New York State Registration Statement for Charitable Organizations, the organization's "purpose" was described as: "Families for Excellent Schools harnesses the power of families to advance policy and political changes that create and sustain excellent schools."

Any organization that utilizes a well-funded war chest to sway the minds of the public at large needs to disclose these funders. We cannot pretend that this is simply a problem of 501(c4)

The Pass-Through Problem

Additionally, Disclosures which simply reveal what is known as a "Russian doll problem" – where the immediate source of the funding is an intermediary entity, or pass-through entity such as a committee or LLC, which is not the original source of the funds – should not be considered to satisfy the requirements of the law. The public has an interest in the disclosure of all major entities that may be involved in a layered organizational structure. Common Cause/NY urges the Commission to draft rules which will provide information regarding the original source of funding, which would treat each of the individual members of a coalition or association (and not the coalition or association) as the donating entity, so long as that individual member provided more than $5,000 to the coalition or association. This can be done by requiring the lobbying entity to obtain the required information from its funders above $5,000. Just as in the campaign contribution area, the reporting organization should be required to reject any contributions above $5,000 designated for lobbying in New York State or which will be used for lobbying from entities or associations which do not provide the required information.

JCOPE has the power to shift the pattern of corruption in Albany by becoming a proactive force – but, only if everyone understands the rules and the consequences. Lobbying disclosures should provide relevant and meaningful information that is readily available to the public in order to track lobbyists' influence in our state policy decision making and to hold their elected officials accountable when they have ethically breached their duties as a public officer. Instead of having the appearance of obfuscation and shielding, JCOPE can become part of a solution of facilitating a government that works for the people. Thank you.

CITIZENS UNION OF THE CITY OF NEW YORK
Testimony to the New York Ethics Review Commission
October 14, 2015

Good day Chair Volker and Commissioners. My name is Dick Dadey, and I am Executive Director at Citizens Union of the City of New York, a nonpartisan good government group dedicated to making democracy work for all New Yorkers. Citizens Union serves as a civic watchdog, combating corruption and fighting for political reform.

Thank you for holding this hearing to gather feedback from the public about ethics oversight in New York State government. Citizens Union also appreciates that we had the opportunity to meet with the Commission regarding the activities and performance of the Joint Commission on Public Ethics ("JCOPE") and the Legislative Ethics Commission ("LEC"). We are pleased that this commission is webcasting this hearing, and hope that this commission will continue to model best practices for transparency and accountability.

Citizens Union has been continually engaged in improving ethics oversight in New York State, and has offered legislative and policy solutions over the years to ensure independent and effective enforcement of our state's evolving ethics laws. Specifically regarding JCOPE and the LEC, we have closely followed their work since the enactment of the Public Integrity Reform Act in 2011, as the act represented a promising change to create a more unified oversight system between the legislative and executive branches.

Understanding that your focus is on the commissions' operations and how they can be improved under existing law, our recommendations today will first emphasize changes that could be accomplished outside of the legislative process. We will also touch upon legislative reforms that are essential to ensuring that ethics oversight in New York State holds officials and lobbyists accountable.

I. Operations and Management of Ethics Oversight

A. Budget and Resources

Goal: to provide JCOPE with sufficient resources to fulfill its mission.

1. Provide JCOPE with independent budgeting, by linking its appropriations to the appropriations of another state agency or public entity. This would ensure that legislators, who are regulated by JCOPE, cannot target JCOPE for budget cuts as a means of affecting the commission's performance of its duties.

2. Invest further in JCOPE's information technology, most notably its website and databases, to ensure that data collection allows for meaningful analysis and oversight of lobbyists and officials (details below). We understand that JCOPE is currently updating its databases, but this effort must be iterative, adjusting to changing reporting schemes.

Citizens Union of the City of New York
299 Broadway, Suite 700 New York, NY 10007-1976
phone 212-227-0342 ◦ fax 212-227-0345 ◦ citizens@citizensunion.org ◦ www.citizensunion.org
Peter J.W. Sherwin, Chair ◦ Dick Dadey, Executive Director

3. Bolster staffing and personnel, by:
   a. Opening the search for JCOPE's executive director and other staff with public job listings.
   b. Empowering JCOPE's executive director to hire staff without micromanagement by commissioners, while retaining the ability of the commissioners to set personnel policies.

B. Accountability and Transparency
Goal: to allow the public to discern how JCOPE and the LEC make decisions, and assess whether such decisions are made with political independence.

1. Encourage JCOPE and the LEC to adhere to the Freedom of Information Law and Open Meetings Law, to avoid short public sessions and long executive sessions.

2. Publish JCOPE commissioners' vote tallies:
   a. For decisions to issue a substantial basis report, JCOPE should publish vote tallies and the name of a subject within seven days, rather than 45 days as currently required.
   b. For instances when a minority of three blocks an investigation or report, JCOPE should publish vote tallies.

3. Establish protections to ensure that JCOPE members operate with independence, such as an internal, enforceable firewall between JCOPE members and entities who appoint them.

C. Oversight of Lobbying Activities
Goal: to ensure that lobbyists are given the tools to best follow laws governing their activities.

1. Standardize reporting requirements and webforms through which lobbyists enter financial disclosures and what predetermined subjects they lobbied on, to ensure that data can be validated, compared, and analyzed. This would allow the public to follow the activities of individual lobbyists and officials, and also to track how lobbying and campaigning evolves over time. Suggestions to updating online forms include:
   a. Providing clearer directions.
   b. Establishing selectable options to ensure that data is validated and standardized, e.g. dropdown menus.
   c. Requiring greater specificity regarding:
      i. who is being lobbied within various offices, by pre-entering names of officials and staffers.
      ii. what positions are being lobbied on legislation.
      iii. what money goes to public education versus advocacy.

2. Improve guidance to lobbyists regarding spending, by clarifying what is public education, advertising, or advocacy – including grassroots lobbying.

D. Oversight of State Officials, Officers, and Employees
Goal: to ensure that officials are given the tools to best follow laws governing their activities.

1. Improve guidance to elected officials regarding ethics requirements, by clarifying requirements set forth in ethics legislation and regulations requirements, which may be interpreted differently by JCOPE and LEC, and thus confuse attempts to observe the law. Such guidance is especially needed on the subjects of:
   a. Public trust violations and duty to report misconduct.
   b. Avoiding the appearance or actuality of officials' connections to certain campaign donors.

2. Alter the method and utility of financial disclosure statements for elected officials, to:
   a. Require public officials to file all financial disclosure statements electronically.
   b. Reevaluate the financial disclosure statement form to make sure it is an effective tool for holding officials accountable, and that it focuses enforcement on filers with a greater risk of conflicts of interest: those who are mandated to file solely on account of their income, and not only because they hold policy-making positions.

E. JCOPE Complaint Response
Goal: to urge proactive and timely investigation and findings regarding complaints.

1. Encourage the practice of investigating complaints and other matters when concerns are raised early – and not merely when a story is covered by the press.

2. Reduce JCOPE's response times to complaints and to guide agencies and actors which it regulates.

II. Critical Legislative and Regulatory Reforms

Noting that this is outside the scope and directive of this commission, Citizens Union submits the following proposals for legislative and regulatory reforms. The Ethics Review Commission should seize the opportunity to go beyond the expressed mandate, to serve the public interest by independently and proactively suggesting changes that will reinforce the goals and recommendations outlined above, creating even more meaningful oversight of public ethics.

A. Composition and Structure
Goal: to maximize commissions' political independence and effectiveness, and ensure that they are truly joint and balanced.

1. Composition and Appointments
   a. Change the number of JCOPE commissioners from the unwieldy 14 to create a streamlined commission of 7 or 9 members, with an odd number to account for tie votes.
   b. Provide the New York State attorney general and comptroller with appointments to JCOPE.

c. Bar elected officials currently in office from serving as commissioners.
d. Establishment nomination and appointment process similar to the Court of Appeals, with a pool of qualified nominees.

2. Voting Structure
   a. Eliminate the rule that three commissioners of the same party and branch as a subject of investigation may block either an investigation or issuing findings.

B. Jurisdiction and Scope

Goal: to ensure meaningful enforcement and reporting.

1. Grant JCOPE complete jurisdiction to hold enforcement hearings and to make findings of fact and conclusions of law.
2. Clarify respective roles of JCOPE and LEC to ensure that they are not working at cross-purposes.
3. Require JCOPE to broaden the scope of its annual report.

For further information about Citizens Union's position on JCOPE and LEC, please see the attached materials: 2015 Position on New York State Ethics Reform, and 2013 Recommendations on JCOPE Voting Procedures and Disclosure.

Citizens Union believes that these changes are crucial to JCOPE's ability to perform its ethics oversight role. New York State needs comprehensive ethics reform to address not only our oversight procedures, but also the structures and laws that allow corruption to proliferate. We urge the New York State legislature to convene for a special session to address ethics reform this fall, and we hope that this commission will join us in this call.

We look forward to your report on November 1st, and hope you will incorporate our recommendations within it. Thank you for the opportunity to testify today, and I will be happy to answer your questions and continue the discussion.

Lawyers Alliance *for* New York

Connecting lawyers, nonprofits, and communities

October 14, 2015

Testimony of Lawyers Alliance for New York, Human Services Council and Nonprofit Coordinating Committee of New York to The New York Ethics Review Commission

by Laura Abel, Senior Policy Counsel

I provide this testimony on behalf of Human Services Council ("HSC), Lawyers Alliance for New York, and Nonprofit Coordinating Committee ("NPCC"). We are concerned that the Public Integrity Reform Act of 2011, and the interpretation of the Act by the Joint Commission on Public Ethics ("JCOPE"), create inefficiencies that divert JCOPE from its core enforcement mission and, at the same time, unnecessarily impede compliance by nonprofit organizations without improving lobbying disclosure. We recommend that JCOPE stop requiring organizations to file the same information with both New York City and JCOPE and stop requiring separate JCOPE lobbyist and client reports from organizations using their own staff to lobby. We also recommend that the expenditure threshold triggering an obligation to register and report as a lobbyist or client be raised to $10,000.

HSC is a coalition of nearly 200 nonprofits strengthening the human services sector's ability to serve New Yorkers in need. As a non-partisan intermediary between government agencies and member organizations, we passionately champion the sector. We proactively negotiate with State and City government for mutually beneficial, solutions-based budget, policy, and legislative reform that improve our constituents' work and the lives of the individuals they serve.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. By connecting lawyers, nonprofits, and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers. We frequently provide advice and assistance to nonprofit organizations seeking to comply with the Lobbying Act.

NPCC is the voice and information source for New York nonprofits. NPCC is an umbrella organization representing and serving some 1,500 member nonprofit 501(c)(3) organizations throughout New York City, Long Island and Westchester. As the largest such organization in our area, we represent all types of nonprofits on sector-wide issues.

Regulatory Inefficiencies

As we describe below, too much of JCOPE's enforcement and compliance resources are spent ensuring that small organizations file duplicate reports regarding a single meeting with a government official. This reduces JCOPE's ability to ensure that all lobbyists and clients fully

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disclose their activities and expenditures in a meaningful way. At the same time, the unnecessary compliance burdens divert nonprofit staff from serving their communities and discourage them from educating government officials about the needs of those communities.

Nonprofit organizations seeking to ensure that NYC government responds to community needs must report that lobbying activity once to the NYC Clerk and again to JCOPE. Additionally, JCOPE requires organizations using their own staff for advocacy to report the same activity to JCOPE once as a lobbyist and again as a client. Thus, a single meeting with a NYC government official must be reported to JCOPE in an organization's Bi-Monthly Lobbyist Report and again in its Client Semi-Annual Report; it would also be reported to the NYC Clerk in a Lobbyist Periodic Report.

These registration and reporting burdens are considerable and can be overwhelming for an organization with just one or two staff people. An organization using its own staff to lobby NYC government must:

- register with JCOPE as a lobbyist every two years and with NYC every year,
- enroll in JCOPE's online filing system as a lobbyist and again as a client, and also enroll in NYC's online filing system as a client/lobbyist (with each enrollment requiring a separate user ID and password),
- file six Bi-Monthly Lobbyist Reports with JCOPE and six Lobbyist Periodic Reports with the NYC Clerk each year, and
- file two Client Semi-Annual Reports with JCOPE each year.

Even after a nonprofit has reported information multiple times, it may still be fined for reporting that same information late on yet another form. Nonprofits are underfunded and understaffed. Time spent drafting multiple mandatory filings for government agencies could be better spent serving the community. Many small nonprofits lack in-house counsel and find complicated reporting schemes baffling. The result: some nonprofits avoid advocating on behalf of their communities in order to avoid excessive paperwork. This frustrates the Lobbying Act's goal of affording "the fullest opportunity...to the people to petition their government for the redress of grievances." Lobbying Act § 1-a.

Eliminating duplicate reporting would increase compliance by reducing confusion among regulated organizations. Nonprofit organizations find it hard to believe that the law really requires them to report the same meeting on two different forms, both of which are submitted to JCOPE, and then again to the NYC Clerk. As a result, some nonprofits unintentionally fail to file one set of reports or the other, increasing the enforcement burden on JCOPE.

Additionally, the Lobbying Act unnecessarily requires reporting by small organizations that engage in only a minimal amount of lobbying. The Commission on Public Integrity (JCOPE's predecessor) recommended raising the expenditure threshold to $10,000 for all filers, in order to "reduc[e] our workload, ... and allow us to focus on that population that may be poses a higher risk of violations while still providing information of almost all the lobbying activity that's currently being done."[1] In 2013, the NYC Lobbying Commission likewise stated that there is "a

[1] Testimony of Barry Ginsberg before the NYC Lobbying Commission, March 30, 2011, pp. 37-41, http://www.nyc.gov/html/lobby/downloads/pdf/033011lobbying.pdf.

strong basis to recommend raising the [NYC] threshold to $10,000 for all filers."[2] Members of both commissions noted that doing so would still capture at least 98% of state and city lobbying expenditures.[3]

At the same time, this unnecessary reporting burden consumes the time of JCOPE staff who must administer an unwieldy system. Rather than monitoring whether multiple, duplicative reports have been filed by nonprofits engaged in a modest amount of lobbying activity, JCOPE's staff time would be more effectively devoted to investigating the unreported lobbying activities of major actors and enforcing the reporting obligations of elected officials. JCOPE's workload is due to increase dramatically, as it is now required to oversee the reporting of lobbying activities directed at small municipalities. The need to focus its resources on its highest priorities is greater than ever.

Our recommendations

In order to focus JCOPE's resources more efficiently and ameliorate the unnecessary burdens imposed on small organizations, we recommend the following measures:

1. Stop requiring organizations to file the same information with both NYC & JCOPE
   Organizations should be able to report information about their advocacy just once, to JCOPE, which has the broadest jurisdiction. JCOPE would share with the City Clerk all information submitted by clients and lobbyists regarding lobbying of New York City officials. The information should be shared promptly and in a data format allowing the City Clerk to fulfill its enforcement obligations. Organizations that want to take advantage of this streamlined procedure would simply file one report containing all of the information required by both the state Lobbying Act and the NYC Lobbying Law.

   JCOPE and the NYC Clerk have the authority to adopt this procedure. JCOPE and the City Clerk both have the authority to design forms for the submission of lobbyist and client reports.[4] The City Clerk could simply deem the requirement to file a Lobbyist Periodic Report to be satisfied by the filing of a JCOPE Lobbyist Bi-Monthly Report containing all of the information required by city Lobbying Law for the relevant reporting period. Likewise, the City Clerk could deem the requirement to file a Client Annual Report to be satisfied by the filing of a two JCOPE Client Semi-Annual Reports covering the relevant reporting period. JCOPE should be required to make every effort to persuade the NYC Clerk to adopt this procedure, and the Lobbying Act should be amended to require JCOPE and the NYC Clerk to cooperate in this fashion.

2. Stop requiring separate JCOPE lobbyist & client reports from organizations using their own staff to lobby: JCOPE should allow organizations using their own staff for lobbying on behalf of the organization to register and report as a lobbyist/client filer. JCOPE has the authority to adopt this procedure. The City Clerk has appropriately interpreted the city

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[2] Final Report of the NYC Lobbying Commission (2013), p. 30.

[3] *See* Final Report of the NYC Lobbying Commission (2013), p. 29 (quoting testimony of Barry Ginsberg, Commission on Public Integrity), http://www.nyc.gov/html/lobby/downloads/pdf/033011lobbying.pdf; Tr. of Public Meeting of the NYC Lobbying Commission (June 24, 2011), p. 5 (statement of Hon. Herbert Berman, Chair), http://www.nyc.gov/html/lobby/downloads/pdf/062411lobbying.pdf.

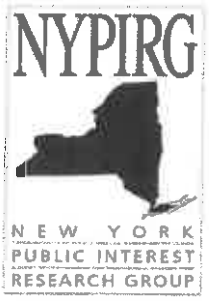
[4] NYS Legis. Law § 1-d(d); NYC Admin. Code §§ 3-212.

Lobbying Law (which has provisions regarding registration and reporting that are extremely similar to those in the state Lobbying Act) as allowing it to: a) permit an organization using its own staff for lobbying on behalf of the organization to register as a lobbyist/client filer, and b) deem the submission of a the final Lobbyist Periodic Report in a calendar year to constitute satisfaction of the requirement to file a Client Annual Report.[5] JCOPE should interpret the Lobbying Act in a similar manner.

3. Raise the expenditure threshold to $10,000: As we note above, JCOPE's predecessor and the NYC Lobbying Commission have each recommended raising the expenditure threshold to $10,000. Doing so would allow JCOPE to focus on higher spenders, who pose the greatest risk of lobbying violations, while still capturing the vast majority of state and city lobbying expenditures.

Thank you for considering these recommendations.

[5] **NYC Clerk, Lobbying Bureau,** FAQs # 26, http://www.cityclerk.nyc.gov/html/lobbying/general%20topics.shtml.



TESTIMONY
OF THE
NEW YORK PUBLIC INTEREST RESEARCH GROUP
BEFORE THE
NEW YORK ETHICS REVIEW COMMISSION
OCTOBER 14, 2015
New York, N.Y.

Good morning. My name is Blair Horner and I am the Executive Director of the New York Public Interest Research Group Fund (NYPIRG). NYPIRG is a non-partisan, not-for-profit, research and advocacy organization. Consumer protection, environmental preservation, health care, higher education, and governmental reforms are our principal areas of concern.

We appreciate this opportunity to share our perspectives on your examination of both the Joint Commission on Public Ethics (JCOPE) and the Legislative Ethics Commission (LEC). Both of these agencies grew out of negotiations in 2011 between the governor and the legislature to overhaul and strengthen the state's ethics laws.

In our view, those reforms have fallen far short what New York needs. And despite continued changes in the laws since 2011, both JCOPE and LEC have never recovered from the structural flaws built into laws that established their creation and the faulty steps both have taken since.

Your mandate is daunting, but critically important. As stated in the enacting legislation, the review commission will

> review and evaluate the activities and performance of the joint commission on public ethics and the legislative ethics commission in implementing the provisions of this act

and that the commission

> shall include any administrative and legislative recommendations on strengthening the administration and enforcement of the ethics law

Reviewing the state's ethics law changes is important and that importance is not an academic one. Over the past years, New York has been plagued by a seemingly unending series of investigation, controversies, and scandals concerning state public officials. Yet, the state's leading ethics watchdogs have been largely on the sidelines. And while there may be

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explanations for this apparent inactivity, the public deserves to know that. And if the ethics watchdogs have been paralyzed by state law, or lack of resources, or political paralysis, the public deserves to know that too.

The public's deepening cynicism and growing anger has been well-documented. In a recent poll, 90 percent of New Yorkers think that corruption is a serious problem in state government and that it has gotten worse over the past few years.[1] The public's cynicism is not unwarranted. As you know, this review commission was supposed to have been appointed and have issued its report last year. It took additional scandals to jar Albany into action.

It is important that you use this opportunity to not only examine those issues described in your statutory mandate, but also help build either public confidence in its ethics institutions or help make the case for needed changes.

But it is critical that you press edges of the envelop. The public, the people who fund these ethics agencies and the work that you are doing, deserves to get their money's worth by having independent ethics agencies that follow the law without fear or favor. Or they deserve to see these agencies defunded and the charade ended.

One of the major criticisms of the state ethics oversights entities are that both are political creatures – meaning that the appointments process is designed to reflect political power and that each appointing authority expects its appointees to look of out for its interests.

Of course, that criticism may be unfair, but it is a good place to start. We do not know what steps your group has already taken to obtain important information that you may need to fulfill your mission, thus some of our ideas may have already been tackled. Nonetheless, NYPIRG's comments are framed as questions that we urge you to consider over the next few weeks.

Question: How independent are JCOPE and LEC? We recommend that you request interviews with JCOPE and LEC commissioners as well as their executive directors about their communication with their appointing authorities, or the executive and legislative branches generally. We recommend that such interviews be conducted under oath. In addition, we urge you to file Freedom of Information Law requests to obtain *any* communication between the executive and the legislature and JCOPE or LEC – either commissioners or its staff.

Question: Is the largest-in-the-nation ethics board too unwieldy to manage?
JCOPE's board is the largest in the nation. Experts have argued that a board of such size is too unwieldy and prone to leaks.[2] It is clearly the result of a political compromise, one that – in our opinion – put legislative expedience ahead of what experts consider to be best practice as well as ahead of the public's best interests.

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[1] Siena Research Institute, "Corruption – A Serious Problem – Has Not Gotten Worse Over Last Few Years, Voters Say," May 26, 2015, see: https://www.siena.edu/news-events/article/corruption-a-serious-problem-has-not-gotten-worse-over-last-few-years-voter.
[2] Davies, M., "New York State Whiffs On Ethics Reform," p. 718-719.

JCOPE's board consists of 14 members, 6 of whom are appointed by the governor.[3] The panel's size is far too large, the largest in the nation.[4] We believe that the board should be smaller in number. Large boards are unwieldy, inhibit substantive discussion and make decision-making more difficult.

Question: What is the rationale for allowing elected officials to serve on the JCOPE and LEC boards, an allowance rarely found?
The public deserves ethics agencies that are viewed as independent. Having those with a self-interest running those agencies undermines that view. Moreover, allowing elected officials to serve on the board of JCOPE – which has regulatory authority over the lobbying industry – creates an inherent conflict of interest (in fact, the first chairperson was not only an elected official, but one who also served as the head of a lobbying group). Presumably, negotiators had some rationale for allowing such an arrangement; the public deserves to hear it.

If that rationale does not exist, or is weak, the public deserves reform. We believe that the law must be bar the involvement of elected officials from either of the ethics watchdog agencies.[5]

Question: Why are both the Comptroller and the Attorney General prohibited from making appointments to JCOPE?
Both offices had appointments to the old State Ethics Commission, what was the rationale for eliminating their appointing authorities? Of course, this raises the issue of the appointment process for the boards generally. Nevertheless, the question should be asked. The public votes for these individuals, why are they cut out?

Question: How does JCOPE decide on its opinions?
NYPIRG has filed and reviewed some of the decisions of JCOPE. We are puzzled by its actions. For example, we filed a request for an investigation and/or advisory opinion on whether the state's political parties should be covered by the lobbying act. At that time, the State Democratic Committee was spending far more advancing legislation than any other entity.

While you may think that political parties should be exempt, there is nothing in the law that says so. Attached to our testimony is our request for action by JCOPE as well as its response. As you will see, the response came from the executive director, we do not know if it was ever considered by the full JCOPE commission. Moreover, her argument was, essentially, that we have never decided to make political parties covered by the Lobby Act and thus will not now. There was no legal rationale.

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[3] New York State Joint Commission on Public Ethics, see, e.g., *About Us*, http://www.jcope.ny.gov/about/commission.html.
[4] National Conference of State Legislatures analysis shows that no other ethics agency has as many members as New York. For more information, see: www.ncsl.org/research/ethics/state-ethics-commissions.aspx.
[5] National Conference of State Legislatures analysis shows that the overwhelming majority of states prohibit public officials from membership on their ethics agencies. For more information see: www.ncsl.org/research/ethics/state-ethics-commissions.aspx.

Secondly, on April 23, 2014 we submitted a complaint about a possible violation of state lobbying law regarding a well-connected political developer. As of today, we have received no response regarding our complaint. As copy of our complaint is attached.

Lastly, we are surprised that JCOPE appeared to allow the governor to accept an enormous sum for a book fee from an entity whose parent organization has business before the government. Attached is the letter granting the governor permission, what is notably absent in the letter is that there is no reference to the size of the fee or the fact that the book publisher's parent company has business before the government. We urge you to dig deep into how decisions get made, or not made.

Question: Why has JCOPE chosen to operate in maximum secrecy?
JCOPE has urged that the governor and legislature agree to changes in the law that would allow for greater transparency in the agency's deliberations.[6] Yet, a close read of the law seems to grant the JCOPE the authority to be more open:

> "Notwithstanding the provisions of article seven of the public officers law, no meeting or proceeding including any such proceeding contemplated under paragraph (h) or (i) of subdivision nine of this section, of the commission shall be open to the **public except if expressly provided otherwise by the commission** or as is required by article one-A of the legislative law." [Emphasis added]

We urge you to examine why JCOPE has not chosen to use this option to open up its proceedings. One additional note, it appears that the Legislative Ethics Commission has not posted an annual report that is more recent than 2012.

Question: How did JCOPE choose former executive branch staff to bring on as its director? Request all correspondence between JCOPE, its commissioners and the executive and legislature. We believe that there should be a "revolving door" limitation that prohibits legislative or executive staff from becoming JCOPE staff.

Question: How has the so-called "legislative veto" impacted on JCOPE and LEC? Request interviews under oath with relevant staff and commissioners. It is our view that 2 commissioners should not be able to stop an investigation approved by the majority. We believe that the current provision giving appointees of legislative leaders a veto on JCOPE investigations of the legislators should be repealed.[7]

Question: How closely reviewed are the ethics filings of public officials?
While it may be true that all ethics filings are accurately filed with the commissions, given the investigations into officials' official ethics reports, it seems hard to believe that only one has been accused of a filing an inaccurate report, as has been reported.[8] Related to that point, is that

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[6] Report From The New York State Joint Commission On Public Ethics, February 2015.
[7] New York State Executive Law §94 13(a).
[8] Mahoney, B., "A guide to what the JCOPE review commission will be looking at," *Politico New York*, see: http://www.capitalnewyork.com/article/albany/2015/10/8579431/guide-what-jcope-review-commission-will-be-looking.

legislators should be required to file electronically. Their filings are often reported in handwriting, sometimes which is hard to decipher.

While it is always difficult to compare states, it appears that New York performs badly in such comparisons. In a recent comparison of state ethics laws, New York's ethics enforcement received a grade of "F."[9]

Both JCOPE and the LEC must have budgets that are predictable, adequate, and not subject to political pressures. The problems at JCOPE had been exacerbated by the impact of budget cuts, which had totaled a reported 4 percent over the past 2 years, until the increase in last year's budget.[10]

The Public Integrity Reform Act of 2011, as well as subsequent changes, made significant improvements in the disclosure of elected officials' outside business interests. For the first time, the narrow ranges showing the values of their outside incomes were made public. There is, however, room for further improvement. Under the current system, legislators send their forms to the in-house Legislative Ethics Commission, which has over a month to make these filings available. These filings should be posted immediately.

Disclosure forms should be submitted and displayed in a digital format. Under the current system, many forms are submitted electronically, but these are printed and scanned by the Legislative Ethics Commission. Submissions must be made in an electronic format.

Finally, JCOPE should work with the campaign finance enforcement entity to link the information contained in their respective databases. Asking filers of lobbying reports to submit the Filer IDs of any PACs they control would be a fairly simple way of doing so.

While our questions may make some individuals uncomfortable, we believe they are among the critical questions that must be asked. These ethics agencies serve the public, not Albany's political class. In order to restore public confidence, your panel should ask the tough questions, operate openly, and transparently offer your insights. New Yorkers deserve nothing less.

Thank you for the opportunity to testify.

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[9] The Center for Public Integrity, State Integrity Investigation project, New York State ranking available at: http://www.stateintegrity.org/new_york.

[10] McKinley, J., "Cuomo Focuses on Ethics Reform, Not on Funding It," *The New York Times*, 3/20/15.

NYPIRG
NEW YORK
PUBLIC INTEREST
RESEARCH GROUP

BY HAND

November 18, 2013

Letizia Tagliafierro, Esq.
Executive Director
Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207

Re: The possible failure of certain state political parties to report their lobbying activities as required under Legislative Law Article 1-A.

Dear Ms. Tagliafierro:

Our organization hereby submits this verified complaint requesting that the Joint Commission on Public Ethics (the "Commission") undertake a review of the lobbying activities of certain political parties in New York State and issue a formal opinion holding that political parties must register as clients and lobbyists and report their activities if they otherwise meet the criteria under the law.

NYPIRG is a non-partisan, non-profit research and advocacy organization. Since 1973, NYPIRG has worked to monitor state government and make it more accountable. As part of our watchdog mission, from time-to-time we have filed complaints with the state's ethics and lobbying watchdog agencies, the forerunners to the Commission. [1]

We believe this matter raises important issues about the interpretation of the state's lobbying act. Our review of media reports, as well as the websites of certain political parties, shows that political parties are involved in spending money seemingly in excess of the lobby reporting threshold to influence legislation in New York and yet have neither registered as lobbyists nor reported their activities as required under the lobby law. Our review of the Legislative Law and the applicable advisory opinions finds no basis for excepting political parties from the provisions of the lobbying law. Accordingly the Commission must review the relevant facts related to lobbying by political parties, issue a formal opinion and take steps to ensure that the law is followed.

[1] Complainant bases this complaint upon information and belief, relying upon published news reports from a variety of reputable news-gathering sources cited herein, public databases and websites sponsored and maintained by the relevant political parties, the essential facts of which have not been fundamentally disputed and which complainant believes to be true. The verification of Blair Horner is appended hereto.

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NEW YORK PUBLIC INTEREST RESEARCH GROUP FUND, INC.

I. Evidence of Lobbying Activities by Certain Political Parties.

News reports make it clear that at least some political parties recently and over time have engaged in lobbying and have not reported these activities to the Commission.

A. Lobbying spending by the State Democratic Party

The following facts are based on several news accounts.[2] Earlier this year, news reports identified the state Democratic Committee as the source of spending seeking to influence legislation being advanced by the governor.[3]

According to the *New York Times*, during the debate over this year's state budget, "the state Democratic Party has begun running ads, at first promoting Mr. Cuomo's budget proposal."[4]

According to a May 2013 report in the *Wall Street Journal*, "the state Democratic party [wa]s set to spend more than $1 million on TV ad campaigns designed to promote and execute two central planks of Gov. Andrew Cuomo's agenda, according to people familiar with the matter." "The campaigns, to begin airing early this week, will focus on Mr. Cuomo's package of anticorruption proposals, as well as on the 10-point Women's Equality Act, which includes a measure to codify state abortion rights with federal law."[5]

B. Additional Evidence of Lobbying by Certain Political Parties

A review of the websites of the state's political parties identified two other political parties that have been involved in lobbying. The Conservative Party has disclosed on its website that it has issued memoranda in reaction to active legislation.[6] A review of the Commission's website found no disclosures by the Conservative Party. Obviously, issuing such memoranda is direct lobbying. The Commission should determine whether the Conservative Party spent enough to meet the minimum $5,000 in spending to trigger the state's lobbying law's registration and reporting requirements.

The Working Families Party also lists a number of positions on legislation.[7] However, there is an organization with a similar name (Working Families Organization) at the same address that is registered and reported on the Commission's website. While we cannot be sure, we assume that such reporting ensures compliance with the state's Lobbying Law. If so, it shows that this entity views lobbying registration and reporting requirements as applicable to political parties.

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[2] Each news account is cited in a footnote.

[3] The State Democratic Party has also set up additional committees, the "New Yorkers for Creating Jobs and Cutting Taxes" (#A19489) and the "New Yorkers for Gun Safety" (#19488) , both of which appear to be explicitly designed to advocate for legislation.

[4] Kaplan, Thomas, *Cuomo's Re-election Machinery is Already at Work, The New York Times*, April 11, 2013. Accessed at www.nytimes.com/2013/04/12/nyregion/cuomos-re-election-machinery-is-already-at-work.html?_r=0

[5] Orden, E., *Ad Blitz Plan Backs Cuomo, The Wall Street Journal*, May 5, 2013.

[6] *See* www.cpnys.org/priorities.

[7] *See* www.workingfamiliesparty.org/our-issues/.

There also is evidence that the state Republican Party has used its funds in the past to lobby state lawmakers. As reported by the *New York Times* in 1995:

> Aides to Mr. Pataki also said today that the Governor had started making personal solicitations for contributions to help finance the Republican State Committee's television and radio advertising campaign in support of his budget.[8]

II. The State Lobbying Law

As described in the legislative findings of Article 1-A of the Legislative Law (the "Lobbying Law"), the public policy rationale for its reporting requirements is that "to preserve and maintain the integrity of the governmental decision-making process in this state, it is necessary that the identity, expenditures and activities of persons and organizations retained, employed or designated to influence the passage or defeat of any legislation."[9]

We believe that certain activities of the Democratic, Republican, Conservative and Working Families political parties have been oriented toward passage of state legislation and may be considered lobbying under the definition contained in the state's Lobbying Law. We can find no exception to the requirement that those entities register as lobbyists and report their lobbying as required under state law.

The law defines *"lobbying"* or *"lobbying activities"* as meaning and including <u>any</u> attempt to influence most decisions made by state and local governments; it does not include an exception or exemption for political parties. Lobbying Law, section 1-c(c). The law broadly defines *"organization"* as "<u>any</u> corporation, company, foundation, association, college as defined by section two of the education law, labor organization, firm, partnership, society, joint stock company, state agency or public corporation." Lobbying Law section 1-c(d). [Emphasis added.] **The Lobbying Law does not carve out political parties.**

However, the law does except campaign donations from the definition of *"expenses,"* which is defined as spending or "expenditures incurred by or reimbursed to the lobbyist for lobbying, but <u>shall not include contributions reportable under article fourteen of the election law</u>." Lobbying Law section 1-c(g). [Emphasis added] In addition, the term *"'compensation"* is defined as "any salary, fee, gift, payment, benefit, loan, advance or any other thing of value paid, owed, given or promised to the lobbyist by the client for lobbying but <u>shall not include contributions reportable pursuant to article fourteen of the election law</u>." Lobbying Law section 1-c(h). [Emphasis added.] We will discuss these sections later.

Notably, the Legislature *demonstrated in the Lobbying Law that it knows exactly how to explicitly carve out certain entities and activities from the law's registration and/or reporting requirements when it wants to*. For example, "[n]ewspapers and other periodicals and radio and

[8] Dao, James, *Pataki Vents Anger Over Stalling of Budget Talks*, *The New York Times*, March 22, 1995. Accessed at www.nytimes.com/1995/03/22/nyregion/pataki-vents-anger-over-stalling-of-budget-talks.html

[9] Legislative Law, Section 1a.

televisions stations, and owners and employees thereof" are expressly deemed not to be lobbying when these entities engage in reporting, editorializing or advertising. Lobbying Law section 1-c(c)(A). Similarly, local lobbying by churches and religious orders are exempt from reporting. Lobby Law section 1-c(c)(F).

Yet no such exception or exemption is provided for political parties that engage in lobbying.

What is clear from a review of state law is that there is no exception from the Lobbying Law's registration and reporting requirements for political parties.

III. The 2003 Lobby Commission Opinion

In response to this issue being raised recently in the media, spokespersons for the state Democratic Committee and the governor told the *Associated Press* that the party's failure to register as a lobbyist and client and report its activities was based on a 2003 advisory opinion from the Commission's forerunner agency, the New York Temporary State Commission on Lobbying (the "Lobbying Commission").[10]

If anything, this opinion supports our reading that the Lobbying Law requires political parties to register and report their lobbying activities.

The 2003 advisory opinion addressed whether the Lobbying Law's reporting requirements were triggered by *contributions* from a campaign committee [the "Andrew Cuomo for Governor" committee (2002)] to not-for-profits (the "Hip Hop Education and Research Fund" and the "Drug Policy Alliance"), some of which clearly was to be used for lobbying the public via radio ads.

The only issue in the 2003 opinion was whether a contribution *from a political committee to a nonprofit advocacy group* was reportable as lobbying compensation or expense. The Lobbying Commission found it was not. The key language from the advisory opinion is

> "To the extent that the donations set forth above are *contributions* reportable pursuant to Article 14 of the Election Law, they do not constitute compensation or expenses under the Lobbying Act." [Emphasis added.][11]

Significantly, the Lobbying Law refers to Election Law reporting in only a few instances: 1) excluding lobbyists' reportable campaign contributions from what is reportable as a lobbying "expense or expenses" [Lobbying Law section 1-(c)(g)]; 2) excluding lobbyists' reportable campaign contributions from the definition of lobbyist "compensation" [Lobbying Law section 1-c(h)]; and excluding lobbyists' reportable campaign contributions from the definition of "gift" [Lobbying Law section 1-c(j)(viii)]. These definitions apply to situations where a lobbyist makes and a political committee receives a "campaign contribution." None of these definitions apply to a political committee *spending* money directly to lobby state lawmakers.

[10] Gormley, Michael, *NY Dem Committee Ads Questioned as Lobbying*, *Associated Press*, November 14, 2013. Accessed at www.timesunion.com/news/article/NY-Dem-Committee-s-ads-questioned-as-lobbying-4982879.php.
[11] New York Temporary State Commission on Lobbying, Advisory Opinion No. 53 (03-4).

While the Lobbying Law does not contain a definition of "contribution," Article 14 of the Election Law does. Election Law section 14-100(9) defines "contribution" to include funds received by a political committee and in-kind donations. Thus, "contributions" under the Election Law are things of value *donated to and received by a political committee* to advance its interests; "contributions" *do not include spending by the committee to lobby lawmakers*.

In contrast to the salient facts in the 2003 Lobbying Commission advisory opinion, as set forth above, here the issue is whether permanent party committees directly spending money in their own capacity to influence lawmakers on legislation that is in play is lobbying.[12]

Moreover, since the drug reform advocacy groups that received the contributions from the Cuomo 2002 committee would have reported their lobbying activity, there was no loss to the public in terms of understanding who was behind efforts to overhaul the state's drug laws.

In contrast, when political parties spend directly on lobbying, the public does not receive the information that would otherwise be disclosed if the party monies were used by other groups to deliver the same message. Lobby reporting is more frequent and more detailed than reports filed under the Election Law. Further, the state Board of Elections has a well-deserved reputation as an anemic regulator and watchdog. Thus, when parties fail to register and report their activities, the Lobby Law's purposes are frustrated and the public is denied information that can help it understand how pressure is brought to bear on lawmakers.

IV. Conclusion

There is little doubt that certain political parties have engaged in lobbying as defined under the law. We urge the Commission to review lobbying spending by *all* political parties, issue a formal opinion holding that such activities trigger registration and reporting requirements under the law where appropriate, and direct that these committees register as lobbying entities, report their activities, and ensure that they comply with other provisions of the lobbying law.

Sincerely,

Blair Horner
Legislative Director

Russ Haven
Legislative Counsel

Attachment: Verification of Blair Horner

[12] The author of the 2003 Lobbying Commission advisory opinion, former Lobby Commission Executive Director David Grandeau, stated that the 2003 advisory opinion does not apply to lobbying by political parties and that the lobby registration and disclosure requirements apply: "That's lobbying, no ifs, ands or buts about it." Gormley, Michael, *NY Dem Committee Ads Questioned as Lobbying*, *Associated Press*, November 14, 2013. Accessed at www.timesunion.com/news/article/NY-Dem-Committee-s-ads-questioned-as-lobbying-4982879.php.

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ALBANY) ss:

Blair Horner, being duly sworn, deposes and says:

I am Legislative Director for NYPIRG, the complainant herein; my work address is 107 Washington Avenue, 2nd Floor, Albany, New York 12210. I have read the foregoing complaint to the New York State Joint Commission on Public Ethics and I know the contents thereof; and I believe the facts contained therein to be true, except as to those matters alleged on information and belief, and that as to those matters I believe them to be true.

Sworn to before me this 18th day of November 2013

Blair Horner

Notary Public

RUSS HAVEN
Notary Public, State of New York
No. 4923830, Nassau County
Commission Expires 3.17.2014

Albany, New York

NYPIRG
NEW YORK
PUBLIC INTEREST
RESEARCH GROUP

BY HAND

January 13, 2014

Daniel J. Horowitz, Chair
Letizia Tagliafierro, Executive Director
Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207

Re: Commission Action on November 18, 2013 Complaint Letter

Dear Chair Horowitz and Executive Director Tagliafierro:

This is a follow up to our notarized complaint letter hand delivered by NYPIRG to the Joint Commission On Public Ethics ("JCOPE") on November 18, 2013 regarding allegations of the possible failure of certain state political parties to report their lobbying activities under Legislative Law Article 1-A (the "Lobby Law"). A copy of this letter is appended hereto for your convenience.

As you know, pursuant to Executive Law sections 94(9)(g) and 94(13) JCOPE is required within 45 days of receipt of a sworn complaint to take action on such complaint. Executive Law section 94(13) provides in relevant part that:

> The commission shall, within forty-five calendar days after a complaint or a referral is received or an investigation is initiated on the commission's own initiative, vote on whether to commence a full investigation of the matter under consideration to determine whether a substantial basis

Accordingly, we urge that JCOPE inform us of whether any action has been taken in response to our sworn complaint. If JCOPE has not yet acted on our letter, we request that you act promptly to investigate the important issues raised by the allegations contained in our letter and inform us of when JCOPE will vote on whether to commence a full investigation of the issues raised by our letter.

107 Washington Avenue, 2nd Floor • Albany, NY 12210-2270 • 518-436-0876 • Fax 518-432-6178
Offices In: Albany, Buffalo, Ithaca, Long Island, New Paltz, New York City, Rochester & Syracuse

Our November letter reviewed media reports, as well as the websites of certain political parties, which showed that political parties are involved in spending money seemingly in excess of the lobby reporting threshold to influence legislation in New York and yet have neither registered as lobbyists nor reported their activities as required under the lobby law. We believe the failure to report these activities deprives the public of important information required to be disclosed under the Lobby Law.

Furthermore, our review of the Legislative Law and the applicable advisory opinions found no basis for excepting political parties from the provisions of the Lobby Law. Accordingly, our November letter requested that the Commission investigate the relevant facts related to lobbying by political parties, issue a formal opinion and take steps to ensure that the law is followed.

Thank you for your prompt attention to this matter.

Sincerely,

Blair Horner
Legislative Director

Russ Haven
Senior Staff Counsel

Enc.

LETIZIA TAGLIAFIERRO
EXECUTIVE DIRECTOR

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

540 BROADWAY
ALBANY, NEW YORK 12207
www.jcope.ny.gov

PHONE: (518) 408-3976
FAX: (518) 408-3975

May 7, 2014

Blair Horner
Legislative Director
New York Public Interest Research Group
107 Washington Avenue, 2nd Floor
Albany, New York 12210-2270

Dear Mr. Horner:

This letter is in response to your request that the New York State Joint Commission on Public Ethics (the "Commission") issue a formal advisory opinion holding that certain political parties in the State must register as lobbyists and/or clients of lobbyists pursuant to the Legislative Law Article 1-A (the "Lobbying Act") and that the Commission undertake a review of these parties' activities.

This Commission and its predecessors have never interpreted the Lobbying Act to require that political parties register as lobbyists. Absent an explicit grant of jurisdiction over political parties in the Lobbying Act, the Commission finds no basis to depart from this precedent.

Very truly yours,

Letizia Tagliafierro

Letizia Tagliafierro
Executive Director

RECEIVED APR 23 2014

HAND DELIVERED

NYPIRG
NEW YORK
PUBLIC INTEREST
RESEARCH GROUP

BY HAND

April 23, 2014

Daniel J. Horwitz, Chairman
Letizia Tagliafierro, Executive Director
Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207

Re: Investigation into Possible Failure to Register and Report Lobbying and Illegal Contingency Compensation

Dear Chairman Horwitz and Executive Director Tagliafierro:

The New York Public Interest Research Group (NYPIRG) hereby submits this verified complaint requesting that the Joint Commission on Public Ethics (the "Commission") undertake an investigation into possible violations of the state's lobbying laws. The potential violations include the failure to register as a lobbyist and the compensation of a lobbyist on a contingency basis.

NYPIRG is a non-partisan, non-profit research and advocacy organization. Over the span of five decades NYPIRG has worked to monitor state government and make it more accountable. As part of this work, from time-to-time NYPIRG has filed complaints with the state's lobbying and ethics oversight agencies.[1]

We believe this matter raises important issues about the interpretation of the state's lobbying laws and compliance with the law and urge the Commission to undertake forthwith an investigation of the issues outlined below.

Background

This complaint arises out of the efforts of Interceptor Ignition Interlocks, Inc. ("Interceptor") to enact legislation and secure certain governmental approvals in New York to gain a competitive advantage for its product. Inceptor markets devices for alcohol testing and

[1]Complainant bases this complaint upon information and belief, relying upon published news reports from established news-gathering organizations cited herein and testimony before and findings made by state Supreme Court, the essential facts of which have not been fundamentally disputed and which complainant believes to be true.

car ignition interlock systems designed to test drivers' blood alcohol levels to prevent convicted drunk drivers from starting and operating a motor vehicle.[2]

On November 18, 2009, Governor David Paterson signed into law the Child Passenger Protection Act, known as "Leandra's Law." Leandra Rosado was killed on the Henry Hudson Parkway when the vehicle she was riding in, driven by the intoxicated mother of a friend, flipped over on the way to a slumber party.[3] The law provides that upon misdemeanor or felony conviction of driving intoxicated with a child under 16 in the car, the driver's license must be suspended for at least six months and an ignition interlock device must be installed in the car at the driver's expense before driving privileges may be resumed. The law also added felony-level charges in the event of serious injury or death of a child.[4]

Under Leandra's Law, the New York State Division of Probation and Correctional Alternatives was charged with establishing regulations concerning compliance monitoring of persons ordered to install and maintain ignition interlock devices.[5] The regulations require that every county in the state establish an ignition interlock program regarding usage of the devices and monitoring the compliance of the operator of vehicles fitted with the ignition interlock system.[6] Leandra's Law became effective on August 15, 2010.

As of July 15, 2010, one month before the law's effective date, Interceptor was among the New York State Office of Probation and Correctional Alternative's list of qualified ignition lock manufacturers.[7]

While Leandra's Law does not require "real time data transmission" of an attempt by someone other than the operator to start the automobile—to warn authorities of a potential attempt to defeat the system to allow the restricted driver to operate the vehicle while intoxicated—the Interceptor device had this capability.[8]

According to submissions, testimony and findings of New York State Supreme Court, Suffolk County in a proceeding brought to challenge Interceptor's corporate management and share distribution practices, on June 6, 2010, Interceptor entered into two agreements with KNET, Inc. ("KNET"), denominated as a "Business Development Agreement" and a

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[2] For more information on Interceptor, see: www.interceptorusa.com/.

[3] *New York Toughens Drunken Driving Law,* Cheryl Robinson, *CNN,* November 19, 2009. Accessed at www.cnn.com/2009/CRIME/11/19/new.york.dwi.law/.

[4] *Child Passenger Protection Act/Ignition Interlock Provision Fact Sheet,* New York State Division of Criminal Justice Services. Accessed at www.criminaljustice.ny.gov/pio/press_releases/2010-7-20_pressrelease.html.

[5] Letter from Robert M. Maccarone, Deputy Commissioner and Director, Division of Criminal Justice Services Office of Probation and Correctional Alternatives, to Suffolk County Executive Steve Levy, June 28, 2010. Accessed at www.criminaljustice.ny.gov/opca/pdfs/suffolkiidplan2.pdf.

[6] *Id.*

[7] *New York State Office of Probation and Correctional Alternatives Preliminary Qualified Manufacturer Listing,* updated July 15, 2010.
Accessed at http://dpca.state.ny.us/pdfs/2010-9att1qualifiedmanufacturerlisting15july2010.pdf. The state's official "request for applications" to qualify as a manufacturer under the program was released on April 23, 2010. It is unclear, what, if anything, Mr. Melius did to assist in obtaining Interceptor's qualification for this list.

[8] *How Melius Firm Gained Business on LI, Benefitted from Rules Set Up by Nassau and Suffolk for Ignition Lock Companies,* Rick Brand, *et al., Newsday,* March 7, 2014, p. A-6.

"Consulting Agreement."[9] Gary Melius, a well known Long Island businessman and well-connected political figure, was the sole shareholder in KNET.[10] The Business Development Agreement contained a provision that triggered compensation in the form of shares in Interceptor upon the passage of a law.[11] In its Decision and Order, the Court, apparently quoting provisions from the Business Development Agreement, wrote:

> ". . . the compensation [would be due] upon 'the enactment or amendment of laws in at least one (1) state within the United States . . . to effect the inclusion of Real-Time Data Transmission as a prerequisite to interlock use and/or certification.'"[12]

The Court goes on to state that "[i]t is conceded that such a law was passed in 2010 in Suffolk County."[13]

The Court indentifies a second contingency compensation clause in the Business Development Agreement:

> " . . . the condition under paragraph 3(a)(ii) which provided for the issuance of 934,405 shares upon introduction to one or more public officials and one or more auto insurers."

While Mr. Melius testified at the court hearing that he did not believe he had satisfied that provision and therefore was not entitled to compensation under paragraph 3(a)(ii), the Court cited a third contingency provision, which Mr. Melius did claim to have satisfied:

> "However, Mr. Melius did believe that he satisfied the condition under paragraph 3(a)(iii) which provided for the issuance of 934,405 shares upon the company becoming certified as an Ignition Interlock Provider ("IIP") in at least one (I) state where the company is not yet certified (see Tr., p. 93)."

---

[9] KNET and Mr. Melius challenged Interceptor's corporate practices and whether they were fairly compensated by Interceptor in a proceeding filed in Supreme Court, Suffolk County (hereinafter the "Decision and Order"). *See Post Hearing Decision and Order for Preliminary Injunction, KNET v. Ruocco* , Thomas F. Whelan, J.S.C., Supreme Court, Suffolk County, New York, I.A.S. Commercial Part 45, Slip Opinion, Index No. 6588/13, dated December 24, 2013. Accessed at http://statecasefiles.justia.com/documents/new-york/other-courts/2013-ny-slip-op-32049-u.pdf?ts=1378741113. This decision describes the Business Development Agreement and the Consulting Agreement in some detail and contains excerpts of hearing testimony from the principals in the underlying lawsuit that further illuminate what was contained in these agreements. The *Newsday* articles cited herein also shed light on the provisions of the contracts and how the parties acted in furtherance thereof. The Business Development Agreement contains the contingency provisions and strongly suggests the performance of lobbying activity as defined in the Lobbying Act.

[10] *Id.*

[11] While the Business Development Agreement required Mr. Melius to perform what appear to be lobbying activities in order to receive compensation, the Consulting Agreement pertained to obtaining funding for Interceptor. Decision and Order at p. 5.

[12] Decision and Order, p. 5.

[13] *Id.*

The Court credited Mr. Melius's testimony with regard to the activities he had undertaken in furtherance of the agreements:

> "Overall, the Court found the Melius testimony, while self-serving at times, to be credible. *He provided governmental access* and personal and bank financing to Interceptor at a time when it needed such assistance and the infusion of cash."[14] [Emphasis added.]

Thus, the Court in awarding shares to Mr. Melius pursuant to the Business Development Agreement expressly found that "he provided governmental access" for Interceptor, a hallmark of lobbying activity.

While it is unclear what role, if any, KNET and Mr. Melius played in getting state certification for Interlock,[15] even the Defendant Mr. Ruocco agreed that it had played a role in adoption of the Suffolk County law:

> "KNET 'got the law changed in Suffolk County and the company experienced some good growth, and we had to have money to build a product, otherwise we would have been put out of business.'"[16]

In an affidavit filed in the case, Mr. Ruocco had stated that "KNET was issued 2,803,214 shares pursuant to Section 3(a)(1). Melius had assisted in the adoption of Leandra's Law and earned those shares."[17] At another point in his testimony at the hearing Mr. Ruocco contradicts the statement made in his affidavit, but does concede that "KNET did assist with the [Suffolk] realtime data transmission law and that KNET earned most of those shares."[18]

Newsday reported that in addition to making campaign donations to the primary sponsor of the Suffolk County law, Legislator Lou D'Amaro, Mr. Melius may have provided him with information on Interceptor prior to the Legislature's vote on the interlock legislation.[19]

According to *Newsday,* the real time data transmission law in Suffolk and the administrative decision made by Nassau County officials to certify only those devices with real time transmission capability gave Interceptor a big advantage over many competitors and as a direct result it saw its market share in each county increase significantly.[20]

In awarding shares to Mr. Melius for his work under the Business Development Agreement paragraph 3(a)(i), the Court declared that "[a]n important law was passed in a state with KNET's assistance, satisfying this provision[.]"

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[14] Decision and Order at p. 6.
[15] *See* note 7, *supra.*
[16] Decision and Order at p. 11.
[17] Decision and Order at p. 5.
[18] *Id.*
[19] *How Melius Firm Gained Business on LI, Benefitted from Rules Set Up by Nassau and Suffolk for Ignition Lock Companies*, Rick Brand, *et al.*, *Newsday*, March 7, 2014, p. A-8.
[20] *Id.* at p. A-7.

In a recent profile, *The Wall Street Journal* characterizes Mr. Melius as a "political animal," and points out that Mr. Melius hosts Monday night poker games with politically well connected figures, including former U.S. Senator and influential lobbyist Alphonse D'Amato, business leaders and prominent individuals in local Democrat party politics.[21] Thus, Mr. Melius's personal and professional contacts put him in proximity to decision makers and those who can exercise influence on decision makers.

Based on a review of the Commission's database for the years 2009-2013, neither KNET nor Mr. Melius have registered as lobbyists or client. Based on a review of the Commission's database for the years 2009-2013, Interceptor has not registered as a client or lobbyist.

1. **Melius Appears to Have Engaged in Activities that Require Compliance with the Lobbying Act.**

Legislative Law Article 1-A, (the "Lobbying Act") defines "lobbying" or "lobbying activities" as meaning and including any attempt to influence most decisions made by state and local governments, including attempts to influence state legislation [Lobbying Act §1-c(c)(i)]; the establishment of a rule or regulation by a state agency [Lobbying Act §1-c(c)(iii)]; county legislation [Lobbying Act §1-c(c)(vii)]; and county administrative decisions [Lobbying Act §1-c(c)(ix)].

Under the Lobbying Act, persons and firms compensated for lobbying on behalf of others are required to register when they meet certain threshold requirements under the law and thereafter report their activities. Lobbying Act §1-e(a)(1). Neither Mr. Melius nor KNET appear in the JCOPE online records for years 2009-2013 as being registered as a lobbyist.

The June 6, 2010 Business Development Contract between Interceptor and Mr. Melius as sole shareholder of KNET appears to call for Mr. Melius to engage in lobbying activity. As noted, even the defendant in a bitter court case, Mr. Ruocco, stated that "KNET [Mr. Melius] did assist with the [Suffolk] realtime data transmission law and that KNET earned most of those shares," which resulted in the issuance to Mr. Melius of 2,803,214 share of Interceptor stock.[22]

Notably, the Decision and Order from Suffolk County Supreme Court and the reporting by *The Wall Street Journal* and *Newsday* do not identify any other party or individual who had a contractual incentive or otherwise engaged in lobbying for state law or certification, local laws or local certification of the Interceptor system. The testimony from Mr. Melius, Mr. Ruocco and the award of shares to Mr. Melius pursuant to the contingency provisions of the Business Development Agreement—credited and ordered by state Supreme Court—all point to the performance of lobbying activities at the local and perhaps state level in New York.

Moreover, Mr. Melius's interest in triggering the contingency provision's award of shares in the growing company create a logical nexus to a role as either a lobbyist, lobby client or both.

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[21] *Melius Well-Connected With Long Island's Powerful*, Pervaiz Shallwani, Will James and Keiko Morris, *The Wall Street Journal*, February 26, 2014. Accessed at http://online.wsj.com/news/articles/SB10001424052702304709904579407473834580330.

[22] Decision and Order at p. 5.

Since the operative contractual provisions have the earmarks of a lobbying contract and the testimony credited by the Court and the award of shares under the contingency provision strongly suggest Mr. Melius engaged in lobbying, the Commission should undertake an inquiry to ascertain whether lobbying as defined under state law took place.[23] If Mr. Melius engaged in lobbying, then he was obligated to register and report his activities.[24]

2. Interceptor Appears to Have Failed to Register as a Lobby Client.

Section 1-j of the Lobbying Act requires that clients—those who engage others to lobby on their behalf—report their activities to JCOPE in semi-annual reports.

If, as the judicial and public record strongly suggests, Mr. Melius as sole shareholder of KNET engaged in lobbying on behalf of Interceptor, then Interceptor was a lobby client and required to register and file periodic reports under the Lobbying Act. There are no records on the JCOPE online database indicating that Interceptor registered as a client for the years 2009-2013.

In the event Interceptor engaged KNET, Mr. Melius—or anyone else—to lobby on its behalf, it would be required to register as a lobby client, assuming the other threshold criteria were met.

3. The Interceptor-KNET Business Development Agreement Violates the Anti-Contingency Fee Provision if Lobbying was Part of Contract Performance.

The Lobbying Act bans lobbying contracts where compensation is contingent or adjusted based on the outcome of the lobbying:

> §1-k. Contingent retainer. (a) No client shall retain or employ any lobbyist for compensation, the rate or amount of which compensation in whole or part is contingent or dependent upon:
>
> (1) (A) the passage or defeat of any legislative bill or the approval or veto of any legislation by the governor * * *; [or] ((D) the adoption or rejection of any code, rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency; * * * [or] (2)(A) the passage or defeat of any local law, ordinance, regulation or resolution by any municipality or subdivision thereof, (B) the terms, issuance, modification or rescission of an executive order issued by the chief

[23] While it's possible that Mr. Melius did not engage in lobbying activities, if he enlisted someone else to influence Suffolk County to adopt a law, Nassau County to establish standards mandating real time data transmission interlock systems, New York to pass Leandra's Law, or the state to certify Interceptor, then he would be required to register as a lobby client. For example, Mr. Melius could have provided strategic or political advice to Interceptor without attempting to influence decision makers directly or indirectly and therefore not lobbying.

[24] For purposes of this complaint the activities of KNET and its sole shareholder Mr. Melius are considered as interchangeable. It is possible that KNET, which had a contractual interest in expanding the business of Interceptor, also is a "client" under the Lobbying Act, in which case it would have been required to register and file periodic reports about its activities.

executive officer of a municipality, or (C) the adoption, rejection or implementation of any rule, resolution or regulation having the force and effect of a local law, ordinance or regulation or any rate making proceeding by any municipality or subdivision thereof[.]

The Lobbying Act section 1-k(b) forbids lobbyists from "accept[ing] such retainer or employment" to provide lobbying on a contingency basis and makes a violation of this provision a Class A Misdemeanor.

If Mr. Melius entered into an agreement and engaged in lobbying on behalf of Interceptor or KNET pursuant to a contingency fee arrangement, as indicated by the Business Development Agreement and as credited by the Court in its Decision and Order, then Mr. Melius and Interceptor have violated the Lobbying Act.

Based on the foregoing, we request that the Commission commence an investigation of these related matters to determine whether the identified parties and perhaps others have complied with the Lobbying Act.

Respectfully submitted,

Blair Horner
Legislative Director

Russ Haven, Esq.
Senior Staff Attorney

Enc.: Verification of Blair Horner

VERIFICATION

STATE OF NEW YORK)
COUNTY OF ALBANY) ss:

Blair Horner, being duly sworn, deposes and says:

I am Legislative Director for NYPIRG, the complainant herein; my work address is 107 Washington Avenue, 2nd Floor, Albany, New York 12210. I have read the foregoing complaint to the New York State Joint Commission on Public Ethics and I know the contents thereof; and I believe the facts contained therein to be true, except as to those matters alleged on information and belief, and that as to those matters I believe them to be true.

Sworn to before me this 23rd day of April 2014

Blair Horner

Notary Public

RUSS HAVEN
Notary Public, State of New York
No. 4923830, Nassau County
Commission Expires 3.11.2018

Albany County

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

ANDREW M. CUOMO
GOVERNOR

December 17, 2012

Ellen Biben, Executive Director
Joint Commission on Public Ethics
540 Broadway
Albany, NY 12207

Dear Ms. Biben:

Pursuant to 19 NYCRR Part 932, on behalf of Governor Andrew M. Cuomo, I respectfully ask the Joint Commission on Public Ethics ("JCOPE")[1] to approve Governor Cuomo's participation in an outside activity that would provide income in excess of "nominal compensation." Specifically, Governor Cuomo is seeking to author a book over the next year about his history and life experiences that will be published in 2014 pursuant to an agreement with HarperCollins Publishers. His authoring such a book appears to be consistent with, and sanctioned by the Public Officers Law.

New York State Ethics Commission ("Commission") addressed this precise issue in two advisory opinions with which you are no doubt familiar, A.O. Nos. 89-10 and 96-21. In A.O. No. 89-10, the question presented was whether an individual who was an attorney employed by a State agency could earn royalties from a book he co-authored on his own time using personal and without using State resources. The attorney worked for the State on topics of zoning and local planning to train municipal officials. The department for which he worked did not provide written materials to participants in such training. The attorney co-authored a treatise that would provide a more sophisticated analysis of the same issues upon which he worked with the State. The book would be published by a non-profit organization with whom the royalties would be shared by the authors.

The Commission found that although the material and knowledge presented in the book were gained in the course of the individual performing State duties, the writing of the book was

[1] The Governor is subject to 19 NYCRR § 932.1 (a) so that the "approving authority" for the Governor is the Commission or its executive director. Under current regulations, the pursuit of any outside activity for which the Governor would receive more than $1,000 in compensation or royalties requires such approval.

beyond the scope of such duties and therefore compensable. The Commission accepted and gave "due weight" to the representation by the department for which the individual worked that "*authoring* the book is not reasonably connected to [emphasis added]" his job. The Commission also noted that the target audience was not an audience regulated by that department. If the department later decided to use the book to perform a governmental function (such as training), then the individual would have to forego royalties.

This holding was crystalized in A.O. No. 96-21 in which the Commission addressed the issue of whether an assistant attorney general could write a book on criminal law and procedure (described in the opinion as "purely a matter of legal scholarship based on case law and statutes, and includ[ing] no political or policy statements") as a private endeavor unrelated to his job. Promotion of the book would be handled by a private company "having no former or current dealings with the State," and the author would "not promote the book as part of his official duties for the Department," which would also play no role in its publication or promotion. Finally, a disclaimer stating that "the opinions expressed in the book are [the reporting individual's] and do not necessarily represent those of the Department of Law" would be required.

The Commission found that the public employee could write such a book and receive royalties without violating Public Officers Law § 74, subd. 2, noting the following:

1. the book was written on his own time and not on State time;
2. no State property, personnel or other resources were utilized;
3. the subject matter was sufficiently unrelated to his job responsibilities so that authorship or the advice or material provided in the book could not be viewed as part of his job;
4. the book was not written for an organization or audience which is regulated by, regularly negotiates with, or has contracts with the individual's employing agency;
5. the book did not identify the author as a State employee (although a biography may list such credential);
6. the State agency where the author is employed did not promote or endorse the book;
7. the author did not promote or endorse the book when performing his State duties;
8. the State agency did not use the book or make it available as part of any of its training programs; and
9. the book contained a disclaimer that the opinions and statements contained therein were those of the author and did not represent those of the State agency.

Thus, in considering the above factors, it is beyond cavil that Governor Cuomo could author the text being discussed consistent with the Public Officers Law. Authoring texts is not one of the Governor's official responsibilities nor would his participation in such activity interfere with the performance of official duties. He would not use state resources to either produce or promote the book. JCOPE's approval of this activity would thus be consistent with the Public Officers Law, past practice and the circumstances presented.

Please let me know if you need anything further. On behalf of Governor Cuomo, thank you for considering his request.

Very truly yours,

Seth H. Agata
First Assistant Counsel to the Governor

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

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ELLEN N. BIBEN
EXECUTIVE DIRECTOR

PHONE: (518) 408-3976
FAX: (518) 408-3975

December 28, 2012

Mr. Seth H. Agata
First Assistant Counsel to the Governor
State of New York Executive Chamber
Albany, New York 12224

Dear Mr. Agata:

On behalf of the New York State Joint Commission on Public Ethics ("Commission"), I am writing to inform you that your request, dated December 17, 2012, and submitted on behalf of Governor Andrew M. Cuomo, for approval of an outside activity for the Governor to author a book " about his history and life experiences" that is expected to be published by HarperCollins in 2014 has been ***granted*** provided that the Governor abides by the requirements enumerated below. These requirements apply to all individuals subject to the Public Officers Law who seek to accept payment or royalties in connection with the authoring of a book:

1. The book is written on the individual's own time;

2. No State property, personnel or other resources are utilized in producing or promoting the book;

3. The subject matter of the book is sufficiently unrelated to the individual's job responsibilities so that authorship, advice, or material provided in the book could not be viewed as part of his official position;

4. The book is not written for an organization or audience that is regulated by, regularly negotiates with, or has contracts with the individual's employing agency;

5. The book does not identify the author as a State Official (although a memoir, autobiography, or biography may, among other items, list such credential);

6. No State agency or other department within the State advertises, promotes or otherwise endorses the book;

7. The State Official does not advertise, promote, or otherwise endorse the book when performing State duties;

8. No State agency or other department within the State uses the book or makes it available as part of any program, including but not limited, to any training program; and

9. The book contains a disclaimer that the opinions and statements contained in the book are those of the author only and do not represent the opinion or interest of any State agency or department within the State.

See Advisory Opinion Nos. 89-10, 95-25, 96-21, 98-15, and 98-16.

The request for approval indicates that these nine requirements will be satisfied. Given the context of your request, the third requirement warrants further explication. Any reflection by Governor Cuomo on his personal history and life experience is not considered "part of his official position." *See* Advisory Opinion No. 98-15. Thus, the presence in the book of material or knowledge acquired by the Governor in the course of performing his official responsibilities would not violate the third requirement. Please note that should any information contained in your letter change, then a new request for approval must be submitted on behalf of the Governor.

Very truly yours,

Ellen N. Biben
Executive Director

NEW YORK STATE
JOINT COMMISSION ON PUBLIC ETHICS

540 BROADWAY
ALBANY, NEW YORK 12207
www.jcope.ny.gov

PHONE: (518) 408-3976
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August 27, 2015

Via Electronic Mail

Anthony Crowell
Dean of NY Law School
185 West Broadway
New York, New York 10013

RE: *JCOPE Review Commission*

Dear Dean Crowell:

The JCOPE Review Commission has requested information about the annual budget and expenditures of the Joint Commission on Public Ethics ("JCOPE").

The 2015-16 State budget provides JCOPE with an appropriation of $5.582 million: $4.682 million for personal services ("PS") and $900,000 for non-personal services ("NPS"). This appropriation included an increase of $1.2 million from JCOPE's 2014-15 appropriation. The increase was related to JCOPE's expanded oversight over lobbying and financial disclosures which were enacted into law with the State budget. While the additional funding was initially, and temporarily, applied to PS, subsequently $200,000 was allocated to NPS to fund operational needs associated with JCOPE's increased responsibilities.

As a result of the additional $1 million in PS, JCOPE's cash plan for 15-16 provides for a Full-Time Equivalent (FTE) target of 57. This represents an increase of 12 positions from 14-15. The additional staff includes attorneys, auditors, and filing specialists who will assist JCOPE in satisfying its new mandates. At present, JCOPE has 48 FTEs (51 employees) with plans to fill the remaining vacant positions by the end of the fiscal year.

The chart below reflects the allocation of PS funds among JCOPE's divisions.

JCOPE PS BUDGET ALLOCATION

JCOPE DIVISION	% OF 2015-16 PS APPROPRIATION
Executive Management	14%
Administrative	10%
Investigations and Enforcement	15%
Ethics and Lobbying Guidance	22%
Lobbying and Financial Disclosure Compliance	38%
Commissioners (per diems)	1%
TOTALS	100%

In 2014-15, JCOPE spent $3.627 million, which was approximately 84% of JCOPE's cash target for the year. JCOPE spent almost $2.9 million in PS (85% of JCOPE's PS cash ceiling) and approximately $729,000 in NPS (80% of JCOPE's NPS cash ceiling).

The chart below reflects the approximate allocation of NPS for 14-15:

Lease-related expenses	65%
Information Technology and Communications-related expenses, including phone services, hardware/software, and maintenance	11%
Travel	3%
Supplies and materials and miscellaneous services	21%.

We hope this information addresses your inquiry. If you have any questions or need additional information, please let me know.

Sincerely,

Monica J. Stamm
General Counsel

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October 2, 2015

The Honorable Dale M. Volker, Chair
Ethics Review Commission
c/o 57 Worth Street, E216
New York, NY 10013

Dear Chair Volker:

The Ethics Review Commission has been tasked with reviewing and evaluating the activities of the Joint Commission on Public Ethics ("JCOPE") and the Legislative Ethics Commission in implementing the provisions of the Public Integrity Reform Act of 2011. JCOPE appreciates this opportunity to participate in and support the ongoing work of the Ethics Review Panel.

Earlier this year, JCOPE issued a report reflecting its findings and recommendations concerning its operations and the regulatory environment for which it is responsible. The report represented JCOPE's conclusions after undertaking a comprehensive review of the laws under its jurisdiction, including related regulations and advisory opinions, engaging with other regulatory agencies and the community, and evaluating its experience since commencing operation in December 2011. The report not only summarizes JCOPE's work and accomplishments over its first three years in operation, but it also identifies areas requiring further attention and analysis and proposes modifications to the laws under its jurisdiction. The proposed reforms are intended to: increase transparency of JCOPE's actions; improve compliance with the ethics laws and regulations by individuals and entities under JCOPE's jurisdiction; enhance the accountability of public officials and those who seek to influence government decision-making; and build public confidence that JCOPE is fully equipped to meet its broad mandate.

Among other suggestions, the report included the following specific legislative recommendations which the Ethics Review Panel may want to consider:

Increasing Transparency and Disclosure

- Amend the Executive Law to provide JCOPE with more flexibility to make information public by a vote of the commissioners, including the ability to make investigative findings public if no legal violation is found or if JCOPE determines not to investigate. In addition, consider whether JCOPE's current exemptions from the "Freedom of Information Law" and "Open Meetings Law" (Public Officers Law Arts. 6 and 7) should be modified to increase the transparency of JCOPE's operations while still protecting the integrity of JCOPE's sensitive compliance and investigative functions.

- Amend Legislative Law Article 1-A (the "Lobbying Act") to require lobbyists to disclose political consulting and fundraising activity in their lobbying filings, as is required by the City of New York for lobbyists.

- Amend the Lobbying Act to expressly prohibit lobbying entities and coalitions from creating or participating in shell or pass-through entities in order to shield the identities of the sources from which they solicit or receive funding.

- Amend the Lobbying Act to require that all filings by lobbyists and clients be submitted electronically (absent a demonstrable hardship).

- Amend the Public Officers Law to require that all FDS filings be submitted electronically (absent a demonstrable hardship).

Strengthening Enforcement

- Amend the Executive Law to give JCOPE full jurisdiction over all matters involving State public officials and employees, including those in the Legislative and Executive Branches of government up to and including conducting hearings and making findings of fact and conclusions of law. The Legislature would retain authority over determining an appropriate penalty for its members and staff. (Currently, if an investigative matter involving an employee or member of the Legislature proceeds to a hearing, the hearing is conducted by the Legislative Ethics Commission and not JCOPE).

- Amend the investigative procedures in the Executive Law to modify the 45-day time period in which commissioners must consider an investigative matter to clarify that JCOPE's commissioners are authorized to vote on any action (including adjournment) they deem appropriate within the allowed time period, or as soon thereafter as practicable.

- Amend the Public Officers Law to provide for financial penalties for violations of sections of the State's Code of Ethics (Public Officers Law §74) that currently contain no such penalties.

- Amend the Public Officers Law and the Lobbying Act to prohibit the solicitation, request, aid, or importuning of another to engage in conduct that violates those laws. (Currently, the Public Officers Law and Lobbying Act do not expressly provide for accessorial liability).

- Amend the Lobbying Act to provide financial penalties for a failure to cooperate with a JCOPE audit and for failure to take required ethics training.

- Amend the Lobbying Act to expand the conditions upon which JCOPE can bar an individual or entity from acting as a registered lobbyist to include repeated violations of the Lobbying Act, failure to pay civil fines or penalties imposed by JCOPE, and refusal to cooperate with an audit.

- Amend the Lobbying Act to provide for administrative penalties for violations of restrictions on contingency fee provisions in retainer agreements and to clarify that the registration requirements, restrictions, and penalties include third-party arrangements in which the client hires a third party who, in turn, hires the lobbyist to prevent "cut-out" arrangements.

- Amend the Lobbying Act to eliminate the provision that allows certain lobbyists and clients to avoid financial penalties if they file outstanding disclosure forms after an enforcement hearing.

- Amend the Lobbying Act to mandate that lobbyists and clients maintain records of both lobbying compensation and expenses (as opposed to merely expenses), and to authorize JCOPE to impose a penalty for any failure to do so.

These recommendations as well as others are discussed more fully in the body of the report which was issued in February 2015 and is available www.jcope.ny.gov. Please let us know if you have any questions or need additional information relating to these or any other issues.

Sincerely,

Monica J. Stamm
General Counsel

Richard Rifkin
New York State Bar Association

What Can Ethics Codes Accomplish?

Commentary

The article "Managing Politics? Ethics Regulation and Conflicting Conceptions of 'Good Conduct,'" by Richard Cowell, James Downe, and Karen Morgan, is one of the few efforts to measure the impact of governmental ethics codes. Its main value is that it looks at the effectiveness of these codes. Clearly, this type of review of any government program is important so that we understand whether the program's objectives are being met.

However, in reviewing any program, there needs to be agreement on its objectives. The article addresses the resistance of government officials to the ostensible effort of ethics code makers to impose "coercive state power" by examining multiple examples of local governments in England. From my experience in New York, I suggest that if the primary objective of ethics codes is to change behavior by imposing rules on reluctant government officials, these codes will inevitably be seen as a failure.

Those who enter into government service with a view toward enhancing their own personal interests in some manner will not be deterred by an ethics code, whatever the penalties for violations may be. They will resist, and if resistance to these codes, as described in the article, is seen as a failure of the effort to change behavior, the evaluation will almost always be that the objective has not been met.

I submit that ethics codes have a more limited purpose. They are intended to guide the behavior of government officials who are disposed toward acting in a manner that is consistent with serving the public. In New York, more than 250,000 individuals are governed by the state's ethics laws. From my 30 years of experience in state government, I believe that, overwhelmingly, state officials and employees want to conduct themselves in an ethical manner. Ethics codes are intended to help them in this effort.

Government employees are not monks who, when not working, spend their time tending their gardens. Nor should they be. The people are best served by government officials and employees who are part of the community and have experience in business, law, health care, academics, or other fields. However, that experience creates potential conflicts between their work and outside activities, and these individuals need guidance as to what is permissible and what is not. It is here that codes, opinions, training, and so on, all of which are part of an ethics program, are valuable.

Ethics principles are, of necessity, vague, and government officials need assistance in trying to understand them. This is where ethics regulatory bodies serve their most important function. A good ethics body offers both informal advice to those who inquire as to specific circumstances and more formal advice through a published set of opinions. This advice function allows these regulatory bodies to educate the workforce on the application of the general ethical statutes as they apply to specific situations. It is like the courts interpreting the statutes of a particular jurisdiction, adding definition to the more general language. Beyond advice, training programs are commonly a part of an ethics regime, further increasing the understanding of those subject to the code.

In New York, as in many other jurisdictions, financial disclosure and enforcement are part of the ethics program. Disclosure is certainly useful, as it informs the public of the other activities and financial interests of government officials and employees. To the extent that codes are intended to enhance public confidence in the integrity of government officials, disclosure plays an important role. However, disclosure requirements will hardly ever result in an enforcement body finding a violation of law.

If the assumption is that disclosure will change behavior, the effort will fail. Those who view government service as a means of advancing their own interests, despite ethical restrictions, will not hesitate to hide activities and interests that violate the law. Clearly, if they are prepared to violate ethical rules with more

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serious consequences, they will have little hesitancy in failing to disclose information required on their personal statements. Thus, mandated disclosure will not change behavior.

The final common function of a body that regulates ethics is enforcement. Usually, it is empowered to impose monetary penalties, which makes it appear that ethics codes are intended to change behavior. In some instances, these penalties may, in fact, have that result. However, that is the unusual case. The penalties are often relatively modest and, in many circumstances, may be less than the financial benefit received by the people on whom they are imposed. Thus, if a government official is to consider an action based solely on his or her personal financial interests, it may benefit the official to violate the law and accept the penalty if caught.

More significantly, ethics regulatory bodies are almost always significantly underfunded and unable to enforce the law in a serious manner. For example, when I served as executive director of the New York Ethics Commission, we had 20 employees to carry out all of the commission's functions overseeing 250,000 individuals. With these limited resources, the commission could not possibly have the type of vigorous enforcement that changes behavior through compulsion. And, at least in the United States, the New York experience is typical. If the expectation is that mandated ethics codes will change behavior, a great deal more in the way of resources would be required.

In sum, I think that before any evaluation of the success of ethics codes can be useful, we first need to understand the limited objectives of these codes. It is here that I would like to see the authors of "Managing Politics?" take an admittedly difficult next step: a study to determine whether government employees subject to an ethics code better understand what is expected of them in order to act in an ethical manner.

NEW YORK STATE WHIFFS ON ETHICS REFORM

*Mark Davies**

* Mark Davies is the Executive Director of the New York City Conflicts of Interest Board and the former Executive Director of the Temporary State Commission on Local Government Ethics. The views expressed in this essay do not necessarily reflect those of the Board.

Despite the rousing pronouncements by the governor, the legislature, and even civic groups that New York State has dramatically improved its ethics laws[1] with the passage of the Public Integrity Reform Act of 2011 (Reform Act),[2] in fact elected officials in Albany have done no such thing. They have blown a lot of smoke and erected a lot of mirrors; but significant, substantive ethics reform continues to elude them. This essay will, first, lay out the requirements for an *effective* government ethics law; second, measure the Reform Act against those standards; and, third, recommend a bare-based reform.[3]

INTRODUCTION

At the outset, one must emphasize two points. First, in ethics reform one must never let the perfect be the enemy of the good.[4]

[1] *See* Danny Hakim & Thomas Kaplan, *Though Hailed, Albany Ethics Deal Is Seen as Having Weaknesses*, N.Y. TIMES, June 7, 2011, at A24 ("[G]ood-government groups almost universally endorsed it, saying that it was a major improvement."); Press Release, Andrew M. Cuomo, Governor of N.Y., Governor Cuomo Signs Ethics Reform Legislation (Aug. 15, 2011), *available at* http://www.governor.ny.gov/press/08152011EthicsReformLegislation (announcing that legislation creates "unprecedented transparency, strict disclosure requirements, and a strong independent monitor with broad oversight of New York State government," and is "a major step forward in restoring the people's trust in government and changing the way Albany does business . . . [by bringing] an aggressive new approach to returning integrity to the halls of our Capitol"); Press Release, Sheldon Silver, N.Y. State Assembly Speaker, Speaker Silver Statement on Assembly Passage of Historic Ethics Reform Legislation (June 13, 2011), *available at* http://assembly.state.ny.us/Press/20110613/ (announcing the passage of "historic ethics reform legislation"); Press Release, N.Y. State Senate, Senate Passes Public Integrity Reform Act of 2011 (June 13, 2011), *available at* http://www.nysenate.gov/press-release/senate-passes-public-integrity-reform-act-2011 (characterizing this "major ethics reform legislation . . . [as] a big step forward to restore the public's trust in state government"). The Reform Act followed on the heels of Governor Paterson's veto—overridden by the Assembly but sustained by the Senate—of an even weaker ethics bill. *See* S. 6457, 2010 Leg., 233d Reg. Sess. (N.Y. 2010); Jeremy W. Peters, *Legislature Approves Ethics Bill, but Few Cheer*, N.Y. TIMES, Jan. 21, 2010, at A34; Jeremy W. Peters, *Paterson Vetoes Ethics Bill, Saying It Isn't Real Reform*, N.Y. TIMES, Feb. 3, 2010, at A23; Jeremy W. Peters, *Paterson's Ethics Veto Survives Override Vote*, N.Y. TIMES, Feb. 9, 2010, at A24.

[2] Ch. 399, 2011 N.Y. Sess. Laws 1178–1222 (McKinney 2011).

[3] Note that this essay expresses no opinion on the other issues addressed by the Act, namely: lobbying disclosure (Part B of the Act), pension forfeiture for public officials (Part C), the lobbyist gift ban (Part D), and campaign finance enforcement (Part E). *See* Sponsor's Memorandum from Dean G. Skelos, N.Y. State S., in Support of S. 5679, 2011 Leg., 234th Reg. Sess. (N.Y. 2011), *in* Bill Jacket, L. 2011 c. 399.

[4] The admonition is attributed to VOLTAIRE, LABÉGUEULE, at A3 (1772)

Thus, for example, one should not refuse to support an ethics law merely because it permits relatively small gifts to officials by those doing business with others in their government agency, even though the better practice would call for an outright prohibition on all such gifts. That said, no ethics reform is better than ethics reform that violates the most fundamental principles of government ethics; bad ethics reform is worse than no ethics reform at all. Sadly, measured by that standard, the Reform Act fails.

Second, few of the players in ethics reform at the state level—not the media, not the civic groups, not the governor, not the legislature, and not the public—appear to understand the purpose and function of ethics laws. That ignorance dooms any attempt at an Albany ethics fix because the parties involved erect their reform efforts not upon the foundation of the purpose and principles of an effective government ethics law, but upon the shifting sands of conflicting political arguments and agendas. The debate *should* center upon how and why one proposed provision promotes that purpose and those principles better than an alternative provision. For example, the debate over the appointment process for ethics commissioners should focus upon which method best promotes the independence, integrity, and efficiency of the ethics commission. But the debate chronically does not. Instead, it focuses upon protecting elected officials against partisan political vendettas. Yet one cannot thus pin the ethics reform tail to a political donkey. As the Reform Act itself demonstrates, that approach does not work. Accordingly, one must first understand the purpose, principles, and content of an effective government ethics law before one can even consider any effort at ethics reform.

("*Dans ses écrits, un sage Italien / Dit que le mieux est l'ennemi du bien.*" ("In his writings, a wise Italian said that the best is the enemy of good.")).

I. THE PURPOSE, PRINCIPLES, AND CONTENT OF AN EFFECTIVE GOVERNMENT ETHICS LAW[5]

A. The Purpose and Principles

The purpose of government ethics laws lies in promoting both the reality *and the perception* of integrity in government by *preventing* unethical conduct (conflicts of interest violations) *before* they occur. A number of principles undergird this purpose. Specifically, an effective government ethics law:

- Promotes not only the reality but also the perception of integrity in government, for no matter how honest the government is in fact, it cannot function effectively if the citizenry believes its officials to be self-serving and corrupt;[6]
- Focuses on prevention, not punishment;
- Recognizes the inherent honesty of public officials;
- Seeks thus to guide those honest officials, not imprison dishonest ones;
- Is, therefore, not intended to (and will not) catch crooks, which is the province of penal laws, law enforcement agencies (including inspectors general), and prosecutors; and
- Ensures that the public has a stake in the ethics system.

As a matter of fact, the vast majority of public servants, including, indisputably, the vast majority of those in the state

[5] *See generally* Mark Davies, *Considering Ethics at the Local Government Level*, *in* ETHICAL STANDARDS IN THE PUBLIC SECTOR 145–76 (Patricia E. Salkin ed., 2d ed. 2008) [hereinafter *Considering Ethics*]; Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, *in* GOVERNMENT ETHICS AND LAW ENFORCEMENT: TOWARD GLOBAL GUIDELINES 97–122 (Yassin El-Ayouty et al. eds., 2000); Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. SCH. L. REV. 177, 181–83 (1995).

[6] Corruption may engender serious political and societal consequences, as the targets of the Arab Spring have learned. *See* Juergen Baetz, *Watchdog: Corruption Ignited This Year's Protests*, BOS. GLOBE, Nov. 30, 2011; *see also* Press Release, Transparency International, 2011 – A Crisis in Governance: Protests That Marked 2011 Show Anger at Corruption in Politics and Public Sector (Dec. 1, 2011), *available at* http://cpi.transparency.org/cpi2011/press ("[P]rotests around the world, often fuelled by corruption and economic instability, clearly show citizens feel their leaders and public institutions are neither transparent nor accountable enough. . . . Most Arab Spring countries rank in the lower half of the [Transparency International Corruption Perceptions Index 2011] . . . . Before the Arab Spring, a Transparency International report on the region warned that nepotism, bribery and patronage were so deeply engrained in daily life that even existing anti-corruption laws had little impact.").

legislature, are honest and want to do the right thing. They are the ones who require not excoriation but guidance, by a clear and effective ethics law, for bribe takers and kickback receivers will never be deterred by any ethics law. Suggesting that ethics laws will prevent criminal or dishonest conduct by legislators will only ensure that those laws fail.

Indeed, most so-called government ethics laws are really conflicts of interest laws that regulate not right and wrong or morality and immorality, but rather conflicts of interest, that is, conflicts (usually, though not always, financial conflicts) between an official's public duties and his or her private interests, in short, divided loyalty.

Accordingly, a government "ethics" law may be either values-based or compliance-based. A values-based (ethics) law promotes positive conduct but may lack sufficient specificity to permit civil fines and other enforcement (except disciplinary action). Such a law might provide, for example, that "public officials shall place the interest of the public before themselves."[7]

By contrast, a compliance-based (conflicts of interest) law provides bright-line, civilly and criminally enforceable rules but focuses on negative conduct and interests. For example, such a law might provide that "a public official shall not accept a gift from any individual or firm doing business with the government agency served by the official."[8] New York Public Officers Law section 73 contains such a conflicts of interest code for New York State officers and employees.[9] Best practice mandates that the government ethics law first set forth ethical precepts (a code of ethics), and then from those precepts draw out compliance-based rules (a conflicts of interest code).

[7] Portions of N.Y. PUB. OFF. LAW § 74, though written in the negative, may be said to constitute ethics code provisions. *See, e.g.*, N.Y. PUB. OFF. LAW § 74(3)(h) (McKinney 2008) ("An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust."). No civil fine, however, may be imposed for a violation of that provision. *See* N.Y. PUB. OFF. LAW § 74(4); N.Y. EXEC. LAW § 94(14) (McKinney 2010).

[8] *Cf.* N.Y.C. CHARTER § 2604(b)(5) (prohibiting a public servant from accepting a valuable gift, as defined by the city's ethics Board, from any person or firm that the public servant knows is or intends to become engaged in business dealings with the city); 53 RULES OF THE CITY OF N.Y. § 1-01 (defining "valuable gift" and setting forth exceptions to the prohibition).

[9] N.Y. PUB. OFF. LAW § 73.

B. Content: The Three Pillars Upon Which an Effective Government Ethics Law Rests

An effective government ethics law must rest upon three pillars. Failure to establish, or removal of, *any* of these pillars inevitably causes the entire structure to collapse. These three pillars are:

(1) A simple, comprehensive, and comprehensible *code of ethics* (technically, a conflicts of interest code)
(2) Sensible *disclosure* and
(3) Administered by an *independent ethics commission* with full authority to interpret and enforce the ethics law for *every* public official subject thereto.

1. Code of Ethics

A simple, comprehensive, and comprehensible code of ethics forms the heart and soul of an ethics law. Critical prohibitions include:

- Using one's government office for private gain, and recusal when any such conflict of interest arises;
- Using government resources for private purposes;
- Soliciting gifts or accepting gifts from persons doing business with the government;
- Seeking or accepting private compensation for doing one's government job (tips, honoraria, and gratuities);
- Soliciting political contributions or political activity from subordinates or from those with whom one deals as part of one's government job;
- Disclosing confidential government information or using that information for a private purpose;
- Appearing before government agencies on behalf of private interests or representing private interests in government matters;
- Seeking a job from a private person or firm with which one is dealing in one's government job;
- After leaving government service,
  - Appearing on behalf of a private employer before one's former government agency for a specified period, such as one year (revolving door);
  - Working on a matter on behalf of a private employer on which one worked personally and substantially while in

government service;
    - Revealing or using confidential government information; and
- Inducing other government officials to violate the conflicts of interest code.

Other common, though less critical,[10] prohibitions may include:

- Having a position or an ownership interest in a firm doing business with the government;
- Purchasing one's government office or position;
- Coercing others (not just subordinates, government contractors, or lobbyists) to make political contributions or engage in political activity;
- Holding certain political party offices (two-hats);
- Engaging in partisan political activity (a little Hatch Act);[11]
- Entering into or maintaining a financial relationship with a superior or subordinate;
- Soliciting subordinates to engage in any non-governmental (not just political) activity or make any non-governmental contributions (e.g., charitable solicitations);
- Engaging in conflicts of interest generally; and
- Engaging in improper conduct generally (appearance of impropriety).

2. Disclosure

Sensible disclosure forms the second pillar upon which an effective government ethics law rests. Such disclosure consists of transactional disclosure, applicant disclosure, and annual (financial) disclosure.

Transactional disclosure, the most critical type of disclosure, occurs when a potential conflict actually arises; transactional disclosure is accompanied by recusal, except perhaps in the case of members of a legislative body.[12] For example, an employee

[10] Less critical does not necessarily mean less important. Rather, the prohibition may be addressed in other statutes, including penal statutes, or may impose too great a burden in the particular jurisdiction subject to the ethics law. *See, e.g.*, N.Y. GEN. MUN. LAW § 801 (McKinney 2010); *Temporary State Commission on Local Government Ethics*, 21 FORDHAM URB. L.J. 1, 8, 9 (1993) (severely criticizing N.Y. GEN. MUN. LAW § 801).

[11] *Cf.* 5 U.S.C. §§ 1501–1508 (2006) (restrictions on political activity of certain state and local employees), §§ 7321–7326 (restrictions on political activity of federal employees).

[12] Unlike in the case of appointed officials and executive branch elected officials, no one may step into the shoes of a recused legislator, whose recusal

may state that "one of the potential bidders on this contract is a company partially owned by my brother, and therefore I recuse myself from working on this RFP." Since transactional disclosure acts directly to avoid a conflict of interest violation, it constitutes the most important form of disclosure—and the least controversial. But transactional disclosure can meet that purpose *only* if it is public, to enable other government officials, the public, and the media to ensure that the recusal is adequate and to reassure the citizenry that the conflicted official will in fact have no impact upon the matter.

Applicant disclosure, in broad-based form relatively rare in most states, requires private citizens and firms seeking government business or a government license or benefit to disclose in the application the interests of officials in the applicant or the application, to the extent the applicant knows.[13] Applicant disclosure acts as a check on transactional disclosure and thus must also be public.

Annual (financial) disclosure remains the most controversial form of disclosure—and justifiably so—largely because of its misuse by elected officials, who often present it to the public as the silver bullet that will cure all ethical ills. The purpose of annual disclosure, like that of ethics laws generally, lies in preventing conflicts of interest violations (unethical conduct) from occurring in the first place.[14] Annual disclosure accomplishes that purpose by disclosing to supervisors, co-workers, the public, the media, and the filer himself or herself where the filer's potential conflicts of interest lie—and by doing so helps prevent those potential conflicts from becoming actual conflicts.[15] For example, if a senior official in a transportation agency discloses on her annual disclosure statement that her sister holds a senior position with a truck manufacturer, then everyone knows that the official has a potential conflict of interest anytime her agency

thus disenfranchises his or her constituents. Furthermore, since a body must act by a majority of the whole number of its members and since a recused legislator, like an absent legislator or a vacant seat, is counted toward that whole number, a recusal effectively acts as a negative vote. N.Y. GEN. CONSTR. LAW § 41 (McKinney 2010). For these reasons, mandating that legislators recuse themselves from voting on a matter raises significant policy issues, at least where the legislator is elected by district rather than at large.

[13] *Considering Ethics*, *supra* note 5, at 163. N.Y. GEN. MUN. LAW § 809 requires a limited form of applicant disclosure in certain municipal land use matters. Lobbyist disclosure may be viewed as a form of applicant disclosure.

[14] *Considering Ethics*, *supra* note 5, at 164.

[15] *Id.*

deals with her sister's company. In addition, annual disclosure should force filers to focus, at least once a year, on the requirements of the applicable ethics code.

But annual disclosure laws, like ethics laws generally, do not catch crooks. No one has yet seen "bribes accepted: $10,000" reported on a financial disclosure statement. Criminal financial disclosure cases invariably arise not from what is reported but from what is not reported.[16] Furthermore, while civic groups raise the shibboleth of "the public's right to know," in fact the public has no more right to know financial information about a public official that cannot produce a conflict of interest than to know the names of officials' paramours or the details of officials' medical conditions. Indeed, paramours and medical conditions appear far more relevant to an official's ability to perform his or her official duties than financial information divorced from an ethics code;[17] all such information should be off limits to disclosure.

Accordingly, the questions on a financial disclosure form *must* reveal potential conflicts of interest under the ethics code. For example, if the ethics law would permit a public servant to take an official action that might benefit a company in which he or she owns less than $10,000 in stock, then the financial disclosure form should not request disclosure of stockholdings under $10,000 because they cannot result in a violation of the ethics law. Unfortunately, many, if not most, annual disclosure laws violate this most fundamental purpose of annual disclosure.

3. Administration

The success of an ethics law rests, first and foremost, upon the quality, integrity, and efficiency of the body that administers it. And that body *must* be independent of all public officials subject

[16] *See, e.g.*, William K. Rashbaum, *Admitting Free Work on Apartment, Kerik Pleads Guilty to Accepting Gift*, N.Y. TIMES, July 1, 2006, at B3 (reporting that Bernard Kerik pleaded guilty to failing to report a loan, in violation of New York City's financial disclosure law, and, while serving as the New York City Police Commissioner, accepting a gift from a firm doing business with the city, in violation of the city's ethics law).

[17] *See* Colin Moynihan, *Key Witness Inconsistent During Trial of Official*, N.Y. TIMES, Nov. 29, 2011, at A30 (reporting allegations that a New York City councilmember had used the executive director of three nonprofit groups, a woman with whom the councilmember had a sexual relationship, to funnel money to himself and others); Sheryl Gay Stolberg, *Bachmann Says Migraines Won't Be a Problem if She's Elected President*, N.Y. TIMES, July 19, 2011, at A18.

to its jurisdiction; or its actions will always be suspect, countermanding the very purpose of the ethics law to promote the reality and perception of integrity in government. The touchstones of independence may be found in qualified, volunteer commission members of high integrity, with fixed terms, removable only for cause, who hold no other government positions, are parties to no government contracts, engage in no lobbying of the government, and do not appear before the government in a representative capacity. Split appointments—that is, appointments by multiple officials—should be avoided because they inevitably produce factions (and not infrequently leaks), as the old New York City Board of Education so dramatically demonstrated.[18] In this author's experience with various ethics bodies, a five-member commission appears the optimal size. Smaller endangers quorums; larger encourages leaks and impedes the efficient disposition of business. The best practice provides for appointment of ethics commissioners by the chief executive with advice and consent of the legislative body. The commission should have a protected budget and a staff accountable solely to the commission itself and should be vested with the sole authority to authoritatively interpret the ethics law, subject to court review.

An ethics commission performs four primary duties: legal advice, ethics training, administration of disclosure, and enforcement. To enable officials to determine whether their conduct violates the ethics code, the commission must provide timely legal advice on the legality of all future conduct and interests under the code. It must also have the ability to grant waivers of the provisions of that code, after sign-off by the affected agency, where the commission determines that the proposed conduct would in fact not conflict with the purposes and interests of the jurisdiction. All requests for advice and all responses thereto must be confidential, lest public officials avoid requesting advice out of fear their supervisor or political opponents may take retaliatory action. Waivers, precisely

[18] *See* Conflict of Interest Bd. v. Kuntz, Case 2008-227 (2009) (finding member of Civilian Complaint Review Board, whose members are appointed by police commissioner, mayor, and city council, in violation of New York City's ethics law for transmitting confidential documents to the New York Civil Liberties Union, with copies to his appointing authority, the New York City Council); Anemona Hartocollis, *Second School Board Member Is Asked to Resign in Fight Over Political Control*, N.Y. TIMES, Apr. 19, 2001, at B1.

because they permit otherwise prohibited conduct, must be public, to enable interested parties to review the factual predicate of the waiver.

The ethics commission must train every official on the requirements of the ethics law. An unknown law cannot be obeyed. The commission must also administer the disclosure system, collecting, reviewing, and making public disclosure statements.

Finally, the commission must have the authority to enforce the ethics law against every official or other person subject to its jurisdiction. An ethics commission without such power will remain a toothless tiger, raising expectations it cannot meet and thus undermining public confidence in government integrity. Enforcement power requires complete control of investigations and prosecution, the ability to commence investigations on the commission's own initiative, subpoena power, and a broad range of penalties (e.g., civil fines, discipline, censure, damages, disgorgement of ill-gotten gains, and debarment), some imposed by the commission, some by the employing agency, and some by the courts. In addition, to protect officials against unfounded accusations while reassuring the public that the government takes violations of the ethics law seriously, enforcement activity prior to the issuance of a formal complaint should remain confidential while proceedings thereafter should be public.

II. AN ASSESSMENT OF THE PUBLIC INTEGRITY REFORM ACT IN LIGHT OF THE STANDARDS FOR AN EFFECTIVE ETHICS LAW

Although one may criticize the failure of the Reform Act to address certain deficiencies in the codes of ethics, found primarily in sections 73 and 74 of the Public Officers Law, for state officers and employees, in fact those provisions, taken as a whole and as interpreted by the Commission on Public Integrity and its predecessor, the State Ethics Commission, provide a reasonably comprehensive code of ethics for those officials. Similarly, one may level substantial criticism at the financial disclosure law, found in section 73-a of the Public Officers Law, because it violates virtually every one of the precepts for annual disclosure laid out above.[19] Yet, even the relatively simple task of revising the financial disclosure form to tie it directly to the code of ethics

[19] N.Y. PUB. OFF. LAW § 73-a (McKinney 2010 & Supp. 2012).

would entail eliminating some of the information called for by the form, a politically insurmountable hurdle in the toxic atmosphere surrounding ethics reform in Albany. That said, the Reform Act's requirement that filers report their major clients,[20] while not a common requirement in the United States, addresses a substantial area of concern about legislative ethics in Albany.[21] So, too, the requirement that the financial disclosure statements of elected officials be posted on the ethics commission's website[22] ensures the ready availability of those reports throughout the state. Finally, the increase in the civil fine for non-disclosure or false statements on a financial disclosure report from $10,000 to $40,000[23] matches the penalty for other ethics violations.[24]

Thus, the real problem with the Reform Act lies overwhelmingly in its administrative provisions. That problem, however, is manifold, specifically in the structure and powers of the Legislative Ethics Commission (LEC) and of the Joint Commission on Public Ethics (JCOPE), each of which is discussed below.

A. Deficiencies in the LEC

The Reform Act maintains the charade, albeit in diluted form, of the legislature overseeing the ethics of its own members and staff.[25] Under the Act, the LEC, four of whose nine members

[20] *Id.* § 73-a(3)(8)(b).

[21] *See* ASS'N OF THE BAR OF THE CITY OF N.Y., REFORMING NEW YORK STATE'S ETHICS LAWS THE RIGHT WAY, at A-3 n.71 (2010), *available at* http://www.abcny.org/pdf/report/uploads/20071860-ReformingNYSEthicsLaws theRightWay.pdf ("At least four states have a disclosure requirement that extends to attorneys . . . ."); Editorial, *Governor Paterson's Turn on Ethics*, N.Y. TIMES, Jan. 24, 2010, at WK0 (asserting the failure to require lawyers to disclose their clients if they have no business with the state "is unfair to the public and to lawmakers who would have to reveal other clients in detail"); Editorial, *One Star for Ethics Reform*, N.Y. TIMES, Jan. 19, 2010, at A0 (stating that the failure to require listing of lawyers' clients "is wrong").

[22] N.Y. PUB. OFF. LAW § 73-a(2)(k).

[23] *Id.* § 73-a(4).

[24] *See* N.Y. EXEC. LAW § 94(14) (McKinney 2010 & Supp. 2012); N.Y. LEGIS. LAW § 80(9)(a) (McKinney 2010 & Supp. 2012); N.Y. PUB. OFF. LAW § 73(18). Most violations of section 74 of the Public Officers Law carry a $10,000 penalty. *See* N.Y. PUB. OFF. LAW § 74(4); N.Y. EXEC. LAW § 94(14).

[25] In February 2011, the Brennan Center for Justice concluded that:

> The Legislative Ethics Commission has proven to be a failed experiment. . . . The bifurcated system has created the perception of special treatment for legislators. . . . One prominent press report of the more lenient interpretation by the LEC verged on mockery. . . . There

must be state legislators, retains *sole* responsibility for:

- Promulgating rules and regulations governing extensions of time to legislators and legislative staff for filing financial disclosure statements;
- Promulgating guidelines to determine which legislative staff are policymakers for financial disclosure purposes;
- Promulgating guidelines on how to segregate conflicted legislators and legislative staff from their private employer's net revenues generated by the conflict;
- Collecting and reviewing financial disclosure statements filed by legislators and legislative staff before passing those statements on to JCOPE;
- Issuing advisory opinions to legislators and legislative staff, opinions that divest JCOPE of jurisdiction to investigate the recipient of the opinion for potentially violating the ethics laws by conduct permitted by the opinion;
- Developing educational materials and training legislators and legislative staff in the ethics laws; and
- Ultimately determining whether an accused legislator or legislative staff member violated the ethics laws and, if so, for imposing penalties for that violation.[26]

Each of these deficiencies is considered below.

Including legislators on the LEC destroys the independence of the LEC, discouraging legislators and staff from seeking opinions or filing complaints, for fear of breaches of confidentiality and retaliation. Curiously, the Reform Act does not subject LEC members to the non-disclosure requirements, and attendant penalties, to which JCOPE members are subject.[27] Furthermore, the appointment process—one legislative member appointed by each of the four leaders[28]—virtually guarantees a politicization of

> are many good examples of unitary, independent ethics commissions. . . . 33 of the 40 states that have ethics commissions give these commissions jurisdiction over both the executive and legislative branches.

BRENNAN CTR. FOR JUSTICE, MEANINGFUL ETHICS REFORMS FOR THE "NEW" ALBANY 2–3 (2011) [hereinafter MEANINGFUL ETHICS REFORMS], *available at* http://brennan.3cdn.net/2c769a401fbe4d30c2_48m6ibx6j.pdf (citations omitted).

[26] N.Y. LEGIS. LAW § 80(1), (7)(e)–(l), (9)(a), (10); N.Y. EXEC. LAW § 94(10)(d), (14-a), (16). Note that, in regard to financial disclosure statements, JCOPE possesses sole authority to grant privacy requests, exemptions from reporting specified information, including the identity of clients, and exemptions from filing. N.Y. EXEC. LAW § 94(9)(h)–(m); *cf.* N.Y. LEGIS. LAW § 80(7).

[27] *Compare* N.Y. EXEC. LAW § 94(9-a), *with* N.Y. LEGIS. LAW § 80(7).

[28] N.Y. LEGIS. LAW § 80(1).

the process, politicization that, however prevalent in Albany, is anathema to an effective ethics system.

So, too, authorizing the LEC to review financial disclosure statements before transmitting them to JCOPE breaches the confidentiality of those statements; and permitting the LEC to grant extensions of time to file such statements, pursuant to LEC-adopted rules, and to determine, in effect, who is and is not a policymaker for financial disclosure purposes risks the adoption of rules and guidelines not only inconsistent with but also more lenient than JCOPE's rules and guidelines, thus further undermining the independence of the financial disclosure system in the legislature. Similarly, empowering the LEC to promulgate guidelines for segregation of conflicted legislators and staff from their firm revenues in cases of conflict of interest, guidelines possibly more lenient than JCOPE's guidelines, permits the legislature to improperly insulate individuals and firms from prosecution for violation of section 73(10) of the Public Officers Law.[29] All of these special provisions for the state legislature conflict with the purpose of ethics laws to promote both the reality and the perception of government integrity.

Authorizing the legislature to issue advisory opinions to its members and staff, opinions that may permit conduct and interests expressly prohibited by JCOPE opinions, not only allows a double (and inconsistent) standard for legislators and executive branch officials but may serve to insulate legislators and staff from investigation and enforcement by JCOPE since "[t]he joint commission on public ethics shall not investigate an individual for potential violations of law based upon conduct approved and covered in its entirety by such an opinion" by the LEC.[30] Permitting the LEC to develop its own ethics training materials and train legislators and staff[31] similarly invites inconsistent interpretations of critical ethics provisions. Indeed, the Reform Act expressly ousts JCOPE of jurisdiction to conduct training of legislators and legislative staff once the LEC has adopted a training program.[32] Yet, in this author's personal experience, reliance upon agencies to train their own employees on ethics laws risks inconsistent and inaccurate training and, as with

[29] N.Y. PUB. OFF. LAW § 73(10).
[30] N.Y. LEGIS. LAW § 80(7)(i).
[31] *Id.* § 80(7)(k).
[32] N.Y. EXEC. LAW § 94(10)(d). Mandated coordination is minimal. *See* N.Y. EXEC. LAW § 94(10)(e).

advisory opinions, may impede the enforcement of the ethics laws by effectively insulating legislators and legislative staff from investigations of conduct that, while violative of the law as interpreted by JCOPE, accords with LEC training.

Finally, and perhaps most egregious, the LEC possesses the power to nullify a finding by JCOPE that a legislator or legislative staff member has violated an ethics law.[33] Specifically, the Reform Act provides that, upon receipt of a written report by JCOPE finding that a substantial basis exists to conclude that a legislator or staff member violated an ethics law, the LEC:

> [Shall] dispose of the matter by making one or more of the following determinations:
>
> a. whether the legislative ethics commission concurs with the joint commission's conclusions of law and the reasons therefor;
>
> b. whether and which penalties have been assessed pursuant to applicable law or rule and the reasons therefor; and
>
> c. whether further actions have been taken by the commission to punish or deter the misconduct at issue and the reasons therefor.[34]

The presence of legislators on the LEC renders this provision particularly offensive, as legislators will be passing (or, one may fear, not passing) judgment upon the actions of their colleagues. As a result, whenever the LEC rejects a JCOPE finding of a violation, even for good and sufficient reasons, the clear import of that exoneration, justified or not, will be that "the fix was in." Moreover, the requirement that JCOPE turn over its entire case file with its report to the LEC[35] further discourages complainants and witnesses from approaching JCOPE about a possible ethics violation by a member or staff member of the legislature. One should again note that the members of the LEC are not even subject to the misdemeanor non-disclosure provision to which JCOPE members are subject.[36]

In addition, upon receipt of a report from JCOPE finding a substantial basis for concluding that a legislator or legislative staff member has violated an ethics law, the LEC has ninety days in which to act.[37] Within the first forty-five days, the LEC can

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[33] *See* N.Y. LEGIS. LAW § 80(10).

[34] *Id.* This provision cross-references N.Y. PUB. OFF. LAW § 73(14-a), a typographical error; the correct cross-reference is N.Y. EXEC. LAW § 94(14-a).

[35] N.Y. EXEC. LAW § 94(14-a).

[36] *Compare id.* § 94(9-a)(c), *with* N.Y. LEGIS. LAW § 80(9)(a).

[37] N.Y. LEGIS. LAW § 80(10).

refer the matter back to JCOPE for additional investigation.[38] These provisions may well result in a substantial delay in the public release of JCOPE's report, perhaps until after an election, and in any event permit the LEC to put the legislators' spin on JCOPE findings at the time they are made public.

The fact is that legislative bodies throughout the United States and abroad have repeatedly shown themselves to be institutionally incapable of policing their own ethics because a legislative body is composed of independently elected officials, who must act as a body, thereby necessitating compromises and trade-offs, and lacks the hierarchical structure of the executive branch. Even parliamentary systems, as in Canada and England, face this same problem.[39] Only an independent body on which *no* present or former legislator or legislative staff member sits can effectively administer a legislative ethics system. Anything less invites (historically well-founded) cries of cronyism. And a system of split appointments, even when it does not engender paralysis, only exacerbates this problem.

Indeed, given Albany's history, the members of the body overseeing legislative ethics must not even be appointed by the legislature. Each member of the Hawaii State Ethics Commission, for example, is appointed by the governor from among two nominations made by the Judicial Council, an advisory body to the Hawaii Supreme Court.[40]

In New York State, the legislature's ethics body has acted only once against a sitting law maker (Assemblymember William F. Boyland, Jr.)—and then only after he was indicted—although at least nine legislators have recently been indicted or convicted of office-related crimes.[41] By contrast, in five years alone, New York City's ethics Board has found five New York City Council

[38] *Id.* § 80(9)(b), (10). Even if the LEC nullifies the determination of JCOPE, the LEC must still publish JCOPE's report, along with the LEC's own determination, within ten days after the LEC determination, unless otherwise requested by a law enforcement authority; if the LEC fails to release the report, then JCOPE must. *Id.* § 80(10).

[39] *See* Oonagh Gay, *The UK Perspective: Ad Hocery at the Centre*, *in* PARLIAMENT'S WATCHDOGS: AT THE CROSSROADS 17, 20–21 (Oonagh Gay & Barry K. Winetrobe eds., 2008); Donald M. Hamilton, *The Role of Legislative Officers in Alberta*, 30 CANADIAN PARLIAMENTARY REV. 19, 19–21 (2007); *Role of the Ethics Commissioner*, CBC NEWS ONLINE (June 10, 2005), http://www.cbc.ca/news/background/cdngovernment/ethics.html.

[40] HAW. REV. STAT. §§ 84-21(a), 601-4 (1993 & Supp. 2010).

[41] Nicholas Confessore & Thomas Kaplan, *Cuomo and Legislative Leaders Strike Deal on New Ethics Rules*, N.Y. TIMES, June 3, 2011, at A1.

members in violation of that City's ethics law,[42] even though the Council generally enjoys a far greater reputation for integrity and, with fifty-one members, is less than a quarter of the size of the state legislature.

B. Deficiencies in JCOPE

While one may thus level substantial criticism at the structure and powers of the LEC, those of JCOPE fare little better. First, the appointment (and removal) process by which three members are appointed (and removable) by the Speaker of the Assembly, three by the Temporary President of the Senate, one by the minority leader of the Assembly, one by the minority leader of the Senate, and six by the governor[43] severely undermines the independence and accountability of JCOPE, as discussed above for the LEC. Thus, although, also as discussed above, JCOPE has little actual authority over the legislature and although the legislative branch constitutes less than two percent of the state work force,[44] the legislature appoints the majority of the members of JCOPE, an unacceptable distribution of power.

Moreover, when these facts are combined with the mandate that at least two of the members of JCOPE voting in favor of a full investigation of a legislative member or staff member must be appointees of a legislative leader or leaders of the same major political party as the subject of the investigation,[45] this appointment process virtually guarantees the factionalizing and politicizing of JCOPE. If both the Senate and Assembly are controlled by the same political party and the subject of the investigation is from the other major political party, then both appointees of the minority leaders of the Senate and Assembly must vote in favor of the investigation, a completely untenable situation.[46] The requirement that half (three) of the governor's

[42] *See Chapter 68 Enforcement Case Summaries*, N.Y.C. CONFLICTS OF INTEREST BD. (updated Jan. 31, 2012), http://www.nyc.gov/html/conflicts/downloads/pdf2/enf%20docs/Enforcement_Case_Summaries.pdf [hereinafter *Chapter 68 Enforcement*].

[43] N.Y. EXEC. LAW § 94(2) (McKinney 2010 & Supp. 2012).

[44] U.S. CENSUS BUREAU, 2010 ANNUAL SURVEY OF PUBLIC EMPLOYMENT AND PAYROLL (2010), *available at* http://www2.census.gov/govs/apes/10stny.txt; EMPIRE CTR. FOR N.Y. STATE POLICY, PAYROLL OF THE STATE LEGISLATURE, http://seethroughny.net/payrolls/legislative (last visited Feb. 2, 2012).

[45] N.Y. EXEC. LAW § 94(13)(a).

[46] The analogous requirement that, where the subject of the investigation is a state officer or state employee, at least two of the eight or more JCOPE

six appointments to JCOPE must be of the major political party opposite to the governor underscores that JCOPE has been established as an inherently political body; even the appointment of the executive director has been politicized, requiring the support of at least one gubernatorial appointee from each of the major political parties and at least one legislative appointee from each of those parties.[47] The inadvisability of these dubious mandates is further compounded by the political party considerations in the voting requirements for a finding of a substantial basis to conclude that a member or staff member of the legislature has violated the ethics law or even for referral of the matter to a prosecutor.[48]

The unwieldy size of JCOPE (fourteen members)[49] far exceeds the optimal size for an effective and efficient ethics body, discouraging consensus, fomenting factions, and encouraging leaks, despite a misdemeanor non-disclosure provision.[50] Indeed, if JCOPE and LEC pay only one per diem per month per member, per diems alone for members of these ethics commissions would cost the people of the State of New York over $68,000 per year, hardly reflective of a lean and mean ethics machine.[51] Indeed, as no cap exists on the annual per diems, the cost could far exceed that amount. Furthermore, the legislature could curry favor (and thus votes) of the non-legislative members of the LEC by payment of substantial annual per diems.

Finally, this author's twenty years' experience as the executive

members voting in favor of a full investigation must have been appointed by the governor and lieutenant governor is marginally less offensive because the legislature appoints the majority (eight of the fourteen members) of JCOPE. But requiring that, where the subject of the investigation is a statewide elected official or his or her direct appointee, at least two of the eight or more JCOPE members voting in favor of an investigation must also be enrolled in the same political party as the subject of the investigation (and appointed by the governor and lieutenant governor) again politicizes and factionalizes the investigative process. *See* N.Y. EXEC. LAW § 94(13)(a).

[47] *See id.* § 94(2), (9)(a).

[48] *Id.* § 94(14-a). In regard to analogous voting requirements for a substantial basis finding where the subject of the investigation is a state officer or employee or a statewide elected official, see discussion *supra* note 46 and accompanying text. For such officers and employees no special voting requirements exist for referrals to a prosecutor. *Compare* N.Y. EXEC. LAW § 94(14-a), *with* N.Y. EXEC. LAW § 94(14-b).

[49] N.Y. EXEC. LAW § 94(2).

[50] *Id.* § 94(9-a).

[51] *Id.* § 94(2), (8); N.Y. LEGIS. LAW § 80(1), (6) (McKinney 2010 & Supp. 2012). The legislative members of the LEC do not receive a per diem. N.Y. LEGIS. LAW § 80(6).

director of ethics agencies would suggest that several of the administrative provisions for JCOPE will prove unworkable. In particular, the Reform Act involves JCOPE members in micromanaging the staffing of JCOPE.[52] Of even greater concern, the Act requires that investigations be commenced not by staff but only by the Commission itself, employing the cumbersome and politicized process discussed above.[53] In 2010, the New York City Conflicts of Interest Board opened 523 enforcement cases and referred 70 for investigation.[54] Requiring that all of those cases go before the Board for a determination on investigation would have slowed enforcement actions to a glacial pace. The Reform Act also micromanages ethics training and even public service announcements.[55]

At the same time, the prohibition on removal of the Executive Director except for neglect of duty, misconduct in office, violation of the confidentiality restrictions on JCOPE members and staff, or inability or failure to discharge the powers and duties of office, including the failure to follow the lawful instructions of the commission,[56] may concentrate too much power in the hands of the Executive Director and create the untenable situation where an Executive Director who, though completely at odds with JCOPE members, cannot be removed as long as he or she keeps a clean nose and avoids insubordination. Thus, the Reform Act contemplates a micromanaging commission and an untouchable Executive Director, hardly a recipe for success.

III. PROPOSALS FOR REFORM

Mean-spirited comments by critics of the Reform Act that no one's life, liberty, or property is safe while the legislature is in session[57] prove singularly unhelpful, for only the legislature and

[52] *See* N.Y. EXEC. LAW § 94(9)(b-1).

[53] *See id.* § 94(13)(a).

[54] *See* N.Y.C. CONFLICTS OF INTEREST BD., 2010 ANNUAL REPORT 44 (2010), *available at* http://www.nyc.gov/html/conflicts/downloads/pdf2/annual_reports/final_report_2010.pdf. The Board's statutory investigator is the New York City Department of Investigation. N.Y.C. CHARTER §§ 2603(e)(2)(b), 2603(f). In 2010, the Board imposed 76 fines and issued 36 public warning letters, for a total of 112 findings of violation, including, incidentally, one councilmember (fined $1,250) and two council staff members (each fined $2,500). *See Chapter 68 Enforcement, supra* note 42.

[55] *See* N.Y. EXEC. LAW § 94(9)(d-1), (10).

[56] *Id.* § 94(9)(a).

[57] Final Accounting in Estate of A.B., 1 Tucker (N.Y. Sur.) 247, 249 (1866).

the governor can fix the problems with New York State's ethics laws, including the problems created by the Reform Act. Fortunately those fixes prove not particularly difficult. Indeed, there are only four of them. One will note that all four changes address the administrative structure of ethics regulation, which remains far more important than tinkering with the financial disclosure form, as poor as it is, or even with the ethics code itself.[58] Without an effective administrative and enforcement mechanism, which has never existed for the legislature in Albany, no hope exists of improving Albany's ethics.

First, the LEC must be abolished and its powers (except imposition of penalties) transferred to the JCOPE, which would have full power over the legislature —to provide advice and ethics training, to administer and enforce annual disclosure, and to enforce the ethics laws, with one exception. In order to preserve

[58] These proposals are largely consistent with the three recent major reports on state ethics reform. *See* ASS'N OF THE BAR THE CITY OF N.Y., REFORMING NEW YORK STATE'S ETHICS LAWS THE RIGHT WAY 34–46 (2010), *available at* http://www.abcny.org/pdf/report/uploads/20071860-ReformingNYSEthicsLaws theRightWay.pdf; N.Y. STATE BAR ASS'N, TASK FORCE ON GOVERNMENT ETHICS 36–37 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=46069; MEANINGFUL ETHICS REFORMS, *supra* note 25, at 2–4. Note that, as a candidate for governor, Andrew Cuomo pledged to create a unified, independent ethics commission:

> Self-policing is rarely effective. Currently, our State government's ethics laws are policed by several separate entities, each without the independence necessary to ensure that violations are fully and fairly investigated and prosecuted. In particular, the Legislature essentially polices itself rather than making its members subject to investigation by an independent body. To restore public confidence and address this potential and actual conflict of interest, Andrew Cuomo will fight to eliminate the existing oversight bodies and establish an independent state ethics commission with robust enforcement powers to investigate and punish violations of law by members of both the executive and legislative branches.
>
> . . . .
>
> Thirty-nine states provide external oversight of their State government officials though an independent ethics commission that has statutory authority and staffing that are independent of the rest of State government. Ethics commissions in only six states, including New York, do not have jurisdiction over state legislators. Such unified authority residing in a truly independent body not only ensures that the laws are interpreted in the same manner regardless of which type of public official is being considered, but also that the regulating officials do not look the other way to protect their colleagues at the expense of the public's interests.

CUOMO 2010, THE NEW NY AGENDA: A PLAN FOR ACTION 7, 7 n.2 (2010), http://www.andrewcuomo.com/system/storage/6/34/9/378/acbookfinal.pdf.

separation of powers and the well-established doctrine that a legislative body should be the sole judge of the qualifications of its members,[59] the legislature must maintain the sole power to impose civil sanctions, including civil fines, upon its members and staff. JCOPE, however, would possess full authority to investigate members and staff of the legislature, hold due process hearings on possible violations, and issue a public report with findings of fact, conclusions of law, and an order finding the legislator or legislative staff member in violation of the ethics laws and recommending a penalty. That public report would be referred for action to the legislature, which could, albeit at its political peril, downgrade the recommended penalty or simply refuse to take action at all. Over the past twenty years this exact approach has worked well in New York City, whose ethics Board, as noted above, has found more legislators and legislative staff in violation of the ethics law in a single year than the legislature's ethics body has in the past twenty years.[60] The legislature then would have no more authority with respect to ethics enforcement than any other state agency, except the legislature would retain sole jurisdiction to impose civil penalties, including civil fines, for violations of the ethics laws by its members and staff.

Second, JCOPE must be reduced in size from fourteen members to five, all of whom must be appointed by the governor with the advice and consent of the legislature, without regard to political party affiliation. Again, that appointment system has worked well in New York City, where the quality and independence of the appointees has been uniformly high and where, under a prior mayor, sometimes the council has not consented, requiring the withdrawal of an nomination and the making of a new one. If, however, the legislature expresses significant and well-founded concern over such gubernatorial appointment power, the solution lies in a process similar to that adopted in Hawaii. The governor can be required to choose from among candidates nominated by a nominating panel (again, without regard to political party affiliation) whose independent,

[59] *See, e.g.*, U.S. CONST. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); N.Y.C. CHARTER § 2603(h)(3) (providing that the New York City Conflicts of Interest Board may determine, in a public order, that a councilmember has violated the City's ethics law but further providing that only the council may impose penalties upon its members and staff).

[60] *See supra* note 54.

non-partisan (*not* bi-partisan), non-political members are specified in the law—for example, the Chief Judge of the State of New York, the President of the New York State Bar Association, the chair of one or more designated civic groups, and the like. But any group, such as unions, active in partisan political matters must be excluded from the nominating panel.[61]

Third, the provisions of the Reform Act that micromanage staff, training, and investigations must be repealed, to promote efficiency, flexibility, and innovation. Instead, the law should include only general provisions on staffing, training, and the relative power of JCOPE members and staff as to investigations. At the same time, the Executive Director must serve at the pleasure of the commission. Finally, the law *must* protect the budget of JCOPE, perhaps as a percentage of the net total expense budget of the state or as a fixed amount with an inflation adjustment,[62] for virtually alone among state agencies, JCOPE

[61] Governor Paterson's ethics bill included a designating commission to appoint the members of a unified state government ethics commission. S. 6615-A, 2010 Leg., 233d Reg. Sess. (N.Y. 2010). Section 8 of the bill would have enacted a new section 73-e of the Public Officers Law establishing the designating commission. *Id.* Although that commission's members would have been appointed by the statewide elected officials and majority and minority legislative leaders, it would have abolished split appointments and removed the appointment of ethics commission members from the direct political process. *Id.* Section 1 of the bill would have given the ethics commission jurisdiction over legislators and legislative staff (proposed N.Y. PUB. OFF. LAW § 73-c(1)). *Id. See* Nicholas Confessore, *Paterson Seeks Sweeping Overhaul to Combat Political Corruption*, N.Y. TIMES, Jan. 5, 2010, at A15; Jimmy Vielkind, *The "Reform Albany Act," Explained*, N.Y. OBSERVER, Jan. 5, 2010; Editorial, *Some Honesty in Albany*, N.Y. TIMES, Jan. 7, 2010, at A30.

[62] *See, e.g.*, N.Y.C. CHARTER § 259(b) ("The appropriations available to pay for the expenses of the independent budget office during each fiscal year shall not be less than ten per centum of the appropriations available to pay for the expenses of the office of management and budget during such fiscal year."); MICH. CONST. art. xi, § 5 (requiring that the legislature appropriate to the Michigan Civil Service Commission "a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year"); NEW ORLEANS HOME RULE CHARTER § 9-401(3) (requiring that the Office of Inspector General, in conjunction with the Ethics Review Board, receive an annual appropriation from the Council, not subject to mayoral veto, in an amount not less than .75% of the General Fund operating budget, enacted in October 2008 by a citywide vote with a margin of nearly eighty percent); CAL. GOV'T CODE § 83122 (West 2005) (guaranteeing a budget of $1,000,000 for fiscal year 1975–1976, adjusted for cost-of-living changes during each fiscal year thereafter, for the California Fair Political Practices Commission); PHIL. HOME RULE CHARTER § 2-300(4)(e) (providing for minimum guaranteed budget of $1,000,000 for first two fiscal years of Philadelphia Board of Ethics and authorizing Board of Ethics to sue the Council if it thereafter fails to provide an amount adequate for the

exercises advice and enforcement power over the very persons who set its budget, often at the very time they are setting its budget, an unseemly conflict of interest that undermines the independence of the commission both in perception and in fact.

With these four changes, the Reform Act would at last deserve its name. Without them, it will remain what it is today: another sad example of legislative smoke and mirrors.

Board of Ethics to meet its Charter mandates); proposed amendment to N.Y.C. CHARTER § 2602(i) ("The appropriations available to pay for the expenses of the [conflicts of interest] board during each fiscal year shall not be less than seven thousandths of one percent of the net total expense budget of the city.").

IT'S ALL POLITICS

New York as a Case Study in the Evolution of Lobbying and Campaign Finance

In the classic view, powerful, moneyed interests engage in direct lobbying by hiring professional lobbyists to meet with politicians on their behalf, while citizens' groups and good government organizations engage in rallies, petition drives and the like.

Increasingly, at both the state and federal level, lobbying activity is changing. T.W. Farnam's February 6th 2013 Influence Industry column in The Washington Post[1] noted, "The business of lobbying is changing in response to an evolving political culture and advances in communications technology, in particular fractured mass media and online social networks." Farnam pointed out that while the money spent on lobbying Washington slightly decreased in 2011 and 2012, "employment in firms specializing in the broad category of public relations – which includes lobbying – actually increased in Washington in 2011." Since official lobbying reports only disclose the time actually spent in direct contact with lawmakers, none of the money spent on advocacy or grassroots advertising in support or opposition to a particular measure or policy is disclosed as "lobbying."[2]

The most recent, and perhaps highest profile, instance of this phenomenon is the formation of Organizing for Action, the advocacy organization formed by President Obama out of his campaign apparatus.[3]

Similar changes are seen at the state level as well. In 2012, The State of New Jersey reported that a second year of heavy mass media spending pushed the amounts reported spent on lobbying to an all-time high of $74 million in 2011.[4] In the Common Cause/NY June, 2011 report, on which this paper is substantially based, we chronicled the exponential increase in lobbying dollars spent on advertising in New York State.[5] In this paper we will provide an update to the extent that public reports allow.[6]

New York State's increasing use of advertising and political campaign tactics in lobbying can serve as a case study of the changes in lobbying practices that are seen at the federal and state level, as well as the impact that a change in law can have on such activities.

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[1] T.W.Farnam, " Lobbying down, but advocacy up", *Washington Post*, Feb.6, 2013. http://www.washingtonpost.com/politics/lobbying-down-but-advocacy-up/2013/02/06/b7d97984-7094-11e2-8b8d-e0b59a1b8e2a_story.html [Accessed March 5, 2013].

[2] Id.

[3] "Obama to Turn Campaign Machinery to Promoting Policy," *New York Times*, January 18, 2013. **http://www.nytimes.com/2013/01/19/us/politics/obamas-campaign-machinery-turns-to-promoting-policy.html** [Accessed March 5, 2013. "Obama campaign to become nonprofit, Organizing for Action," *Washington Post*, January 19, 2013. **http://www.washingtonpost.com/blogs/post-politics/wp/2013/01/18/report-obama-campaign-to-become-nonprofit/** [Accessed March 5, 2013].

[4] New Jersey Election Law Enforcement Commission, *News Release*, March 7, 2012. http://www.elec.state.nj.us/pdffiles/press_releases/pr_03072012_a.pdf [accessed March 5, 2013].

[5] Common Cause/New York, *Lifting the Veil, A Report Analyzing Grassroots Lobbying in New york State and Recommending Amendments to the Lobbying Act*, June 2011. http://www.commoncause.org/NY/

[6] The final reporting for 2012 has not yet been released, so that any figures regarding 2012 activities are subject to revision.

Overview

In any given year, in any given state, the battle over the budget is always a highly contested political debate as competing interests converge on the capital and vie to influence elected officials and public opinion. During times of economic recession, these battles reach fever pitch as governors and legislators struggle to decide if and where to cut spending and procure additional sources of revenue.

But in recent years, the competition for influence in Albany has intensified. New York has seen an exponential rise in statewide spending on lobbying; from $66 million in 2000[7] to more than $220 million in 2011.[8] While traditional direct lobbying continues to dominate – with more than 30 registered lobbyists for each state legislator - there has also been an increasing shift in lobbying tactics. The rise of grassroots, election-style campaigning by powerful interest groups to support or oppose legislation, particularly around the state budget, has resulted in an exponential increase in reported advertising expenditures. While lobbying clients reported spending slightly more than $6 million in advertising expenditures in 2009, the reported advertising expenditures in 2010 jumped almost 500% to just under $30 million.[9] Without a doubt, this shift in tactics has resulted in a greater public awareness of these advocacy efforts.

Large-scale election-style grassroots lobbying in New York began in the late 1990's when interest groups like the 1199/SEIU healthcare workers union, the Greater New York Hospital Association (GNYHA), and New York State United Teachers (NYSUT) began running coordinated campaigns using advertising, canvassing, phone banking, rallies, and other grassroots techniques to fight Governor George Pataki's proposed budget cuts.[10] In 2005, Cablevision (owners of Madison Square Garden) and the New York Jets faced off on the issue of the proposed West Side Stadium and set a precedent for competing special interests to engage in multi-million dollar advertising wars on issue-specific legislation.[11]

Since then, grassroots campaigning has grown in sophistication and is increasingly taking place through third party coalitions with names like "Alliance for Quality Education"[12] and "New Yorkers for Fiscal Fairness."[13] Until very recently, union-affiliated groups have held a near monopoly on this kind of grassroots lobbying on fiscal policy in New York. The organized business community remained focused on traditional direct lobbying and campaign contributions where they have long held a fiscal advantage over the unions[14].

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[7] New York State Commission on Public Integrity. "2009 Annual Report." April 2010. http://www.nyintegrity.org/pubs/annual_report_2009/2009%20Annual%20Report%20Revised.pdf

[8] NYPIRG Report on Lobbying in 2011, April 5, 2012. http://www.nypirg.org/pubs/goodgov/2012.04.05_NYPIRG_Lobbying_in_2011.pdf [Accessed March 5, 2013].

[9] The NY Commission on Public Integrity's May 5, 2011 annual report for 2011 cites reported spending of $29,804,878 for advertising in 2010, contrasted with $6,167,701 in 2009.

[10] Jimmy Vielkind. "The Battle for Hearts and Minds." Albany Times-Union. January 3, 2011. http://www.timesunion.com/default/article/The-battle-for-hearts-and-minds-931844.php

[11] Richard Sandomir. "Stadium Brawl and Family Drama Vie For Spotlight." The New York Times. March 31, 2005. http://www.nytimes.com/2005/03/31/business/media/31dolan.html

[12] See Alliance for Quality Education's history and mission statement at http://www.aqeny.org/about/our-history/

[13] James McKinley Jr. "TV Campaign by Labor Coalition Calls for Higher Tax on Wealthy." The New York Times. March 4, 2003. http://www.nytimes.com/2003/03/04/nyregion/tv-campaign-by-labor-coalition-calls-for-higher-tax-on-wealthy.html

[14] New York Public Interest Research Group. "Capital Investment$ 2010." January 2011. http://www.nypirg.org/goodgov/2011.01.03_CapitalInvestments2010.pdf

In 2006, the upstate business community began to experiment with grassroots lobbying on fiscal policy with an anti-tax campaign called "Unshackle Upstate." In 2009 and 2010, grassroots lobbying reached new heights when business organizations in the beverage and grocery industries adopted election-style tactics in the debate over Governor Paterson's proposed "soda tax" and the sale of wine in grocery stores and spent over $20 million. 2010 also saw the teachers' unions engage in a grassroots lobbying battle with "Education Reform Now," a nonprofit backed by charter school advocates, over the issue of teacher seniority with over $9 million spent on competing advertisements.

And in 2011, upstate and downstate business organizations united behind "The Committee to Save New York," supporting newly elected Governor Andrew Cuomo's [15] objective to reduce New York's deficit "without raising taxes or borrowing."[16] Spending over $11 million in 2011 on advertising, canvassing, voter direct mailing, and social media, the Committee to Save New York marks the full engagement of business interests in the new tactics of election-style grassroots campaigning on legislative issues. In response, the unions organized a new group called the "Strong Economy for All Coalition," with a reported $5 million budget dedicated to grassroots advocacy.[17] However, that group did not approach CSNY's spending, not even making it into the top 20 lobbying spenders in New York for 2011, while CSNY was ranked the largest lobbying spender in 2011. The Committee spent over $4 million, mostly for advertising in the first half of 2012. It has, however, reported lobbying expenses of $4,240 for the second half of 2012. The Committee's website contains ads from 2012, but nothing relating to the current legislative session of the pending state budget.[18] We have found no indication that it is advertising or trying to influence public opinion currently.

Instead, the New York State Democratic Party is running ads praising Governor Cuomo's budget and urging viewers to call their state legislator in support of that budget,[19] as will be discussed below.

Since votes are the ultimate currency in politics, a strong push from public opinion is one of the few forces capable of pushing a contentious budget or other piece of legislation through the maze of special interests in Albany. New York's largest business and labor groups are now set to engage in an escalating battle to influence public opinion on fiscal policy, and special interests are increasingly turning to grassroots campaigning to fight for or against any legislative proposal that might affect their bottom line. As the Committee to Save New York, on the state level, and most recently, Organizing for Action, on the federal level, shows, even powerful Governors and Presidents now find that the communication mechanisms available to them as the chief executive are insufficient and are encouraging the formation of their own "interest groups" to promote their policies to the public.

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[15] Nicholas Confessore and Thomas Kaplan. "Group Takes on Albany with Cuomo's Blessing." The New York Times. January 17, 2011. http://www.nytimes.com/2011/01/18/nyregion/18cuomo.html?_r=1 ; Daniel Massey. "Business Leaders Fill a $10M War Chest." Crain's New York Business. January 9, 2011. http://www.crainsnewyork.com/article/20110109/FREE/301099968

[16] Governor's Press Office. "Governor Cuomo's 2011-2012 Executive Budget Provides Transformation Plan for a New New York." February 1, 2011. http://www.governor.ny.gov/press/020111transformationplan

17 Nicholas Confessore. "Public-Worker Unions Skip Albany Ad Blitz for New Tactics." The New York Times. February 9, 2011. http://www.nytimes.com/2011/02/10/nyregion/10unions.html

[18] http://www.letsfixalbany.org/home [Accessed March 5, 2013].

[19] "Gov. Cuomo using state Democratic Party to raise money to promote his agenda, a departure from reliance on a secret lobbying committee," NY Daily News, February 24, 2013. http://www.nydailynews.com/new-york/cuomo-retreats-committee-save-new-york-article-1.1272216#ixzz2LuoGtQdr [Accessed Feb. 24, 2013]

It is, therefore, not surprising that we are also seeing a change in the type of entities that engage in lobbying at both the state and federal levels. In addition to the law firms and former government officials who previously most typically registered as lobbyists, increasingly, political consultants who establish strong ties to elected officials by advising them on their election campaigns are branching out into lobbying. In New York State, some of the largest and most influential state campaign consulting firms have lobbying departments,[20] paralleling the use of advertising and grassroots campaign tactics in lobbying.

We are unlikely to be able to conclusively answer the obvious "chicken or egg" question arising from this state of affairs: did the increasing use of campaign-style tactics in lobbying encourage political campaign consultants to expand into lobbying or did the increasing number of campaign consultants expanding into lobbying foster the use of campaign tactics in lobbying campaigns? Nevertheless, what it does indicate is that we are likely to see the continued, and indeed, increasing, use of the political campaign tactic playbook in lobbying.

These campaign-style battles are being waged through an increasing number of "veiled actors" -- third-party coalitions with misleading names that ask voters to "Save New York" or fight for "Fiscal Fairness" without revealing the powerful interest groups behind these messages.

If the business community, labor groups, or any other powerful interest believes their preferred policies can "Save New York" or ensure a "Strong Economy for All" they should have no need to hide their real names behind political catchphrases. Unless steps are taken to require proper disclosures and transparency of third-party coalition campaigns, voters will find themselves ever more confused, misled, and excluded from meaningful political participation. New York has taken an initial important step to provide disclosure of the funders behind these veiled lobbying actors, with immediate and surprising consequences that strongly argue for broad adoption of such disclosures at the federal level and in states that do not yet require disclosure.

In this paper, we examine New York State lobbying data to show how the increasing use of third-party coalitions and grassroots campaign-style tactics has played a growing role in shaping political outcomes and furthering the power and influence of special interests at the expense of the public as a case study for trends that are experienced in other states and at the federal level as well.

Just as lobbying and campaign practices have evolved, so must the laws dealing with lobbying and campaign finance change to keep pace. It may well be that the legal framework which regulates lobbying and campaign expenditures separately should be reconsidered in light of contemporary practices. In the end, money spent to influence the public, whether to vote for a candidate or place a call to their legislator, is simply political spending and should regulated as such.

GRASSROOTS LOBBYING'S GROWING ROLE IN SHAPING

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[20] For example, The Parkside Group, among the leading firms serving Democratic clients, lists "Public Relations, Advertising, Government Affairs, Campaign Management" on its website home page, http://www.theparksidegroup.com/# [Accessed March 6,2013], while Bill Lynch & Associates, lists Government Relations and Campaign Consulting at the top of the list of services it provides. http://www.billlynchassociates.com/services.html [Accessed March 6, 2013].

NEW YORK STATE FISCAL POLICY

FROM 2005-2010, ORGANIZED LABOR OUTSPENT ORGANIZED BUSINESS BY ALMOST 8 TO 1.

Business groups focused on traditional lobbying while labor groups engaged in election-style campaigns with advertising and grassroots constituent outreach.

In October 2010, as he was heading into the home stretch of an uncompetitive race with Carl Paladino (R), Democratic gubernatorial candidate Andrew Cuomo was already looking ahead to strategize how to achieve his campaign promise of balancing the state's budget with "no new taxes or borrowing."

In an interview with New York Times reporter Nicholas Confessore, Cuomo revealed a plan to bring business groups back into prominence in state politics to counter the influence of New York's unions:

> "You have four, five, six special interests in Albany who are all but dominant...They are primarily labor unions...historically you had labor and you had business and there was sort of a balance. So you have to bring other people into the political mix in Albany."[21]

Governor Cuomo is correct that when you compare lobbying expenditures, Albany's largest and most politically active labor unions – the 1199/SEIU healthcare workers union (who collaborate with the consortium of hospital owners, the Greater New York Hospital Association or GNYHA), New York State United Teachers (NYSUT), United University Professions (UUP), Public Employees Federation (PEF), and Civil Service Employees Association (CSEA)—have vastly outspent the state's major pro-business organizational lobbies in prior years.[22]

From 2005-2010, these unions and the third-party coalition campaigns they supported– the Alliance for Quality Education and New Yorkers for Fiscal Fairness – spent over $80 million on lobbying, out of the total of $1.08 billion spent by all lobbying entities in the state. Over half of this spending went to grassroots campaign-style tactics, mostly advertising. The 1199/SEIU & GNYHA Healthcare Education Project was by far the largest spender at over $36 million with NYSUT second at over $17.5 million. The other unions and coalition groups each spent less than $8 million over the five year period.[23]

From 2005-2010, the state's major organized business lobbies—the Business Council of New York State, Bankers Association, Real Estate Board of New York (REBNY), Partnership for New York City, Buffalo-Niagara Partnership, Rochester Business Alliance, and a coalition of upstate business interests called "Unshackle Upstate"—spent roughly $11.8 million combined.

Most of this spending came from the three statewide organized business lobbies, the Business Council, the Bankers Association, and REBNY. Regional business lobbies like the Partnership for NYC and the Buffalo Niagara Partnership spent comparatively little, and upstate and downstate business groups did not coordinate their efforts through any third party-coalitions. It is particularly striking how little the organized business lobbies spent on advertising in comparison to the organized labor groups during this time period.

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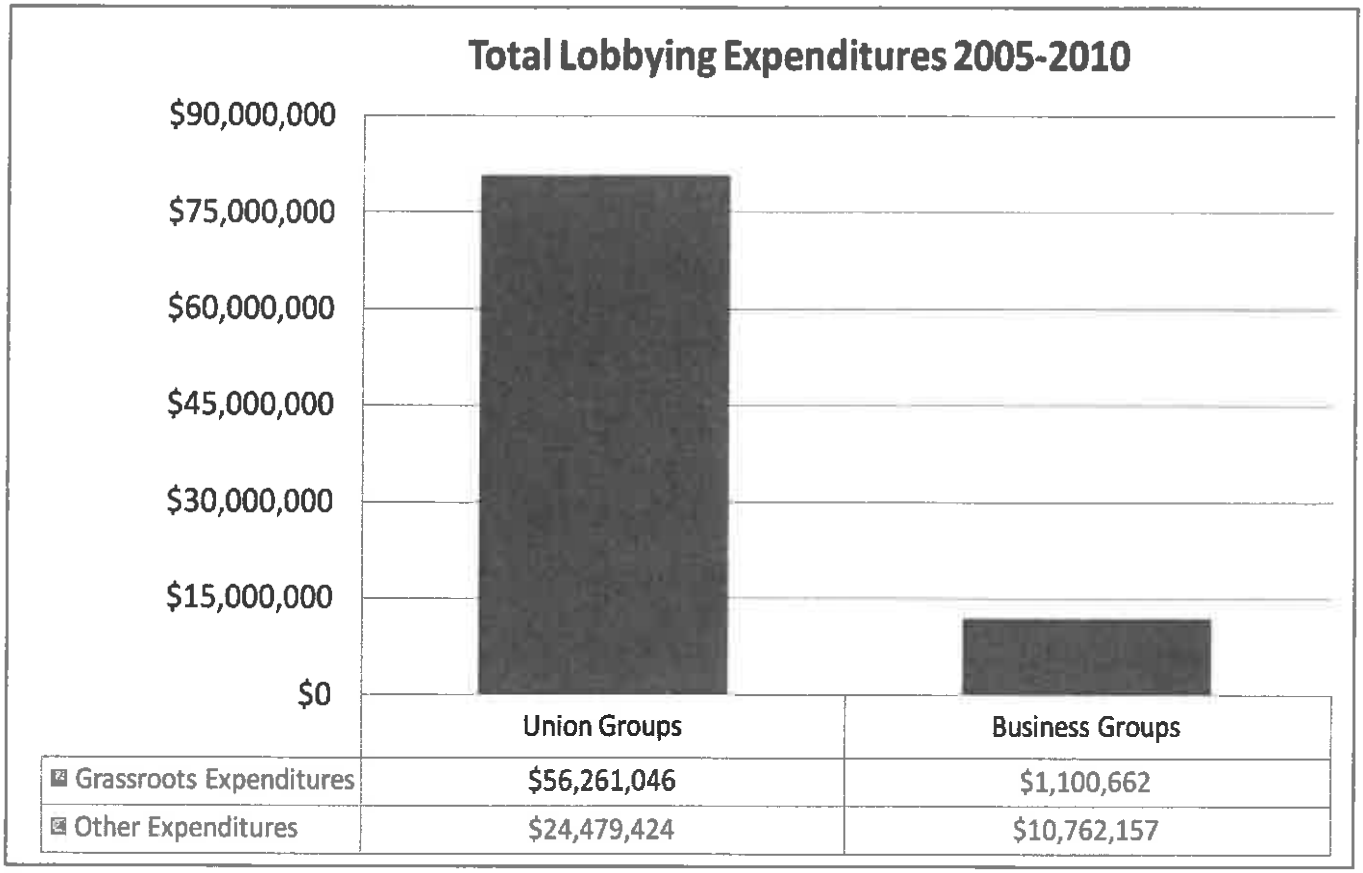
[21] Nicholas Confessore. "Cuomo Vows Offensive Against Labor Unions." The New York Times. October 24, 2010. http://www.nytimes.com/2010/10/25/nyregion/25cuomo.html.

[22] Although New York's top union groups dominate the top of the list of spenders from 2005-2010, it is important to note if total statewide spending for *all* unions and individual businesses is compared, businesses actually outspend unions roughly 3 to 1.

[23] See appendix for full record of lobbying and campaign contributions for each of these organizations.



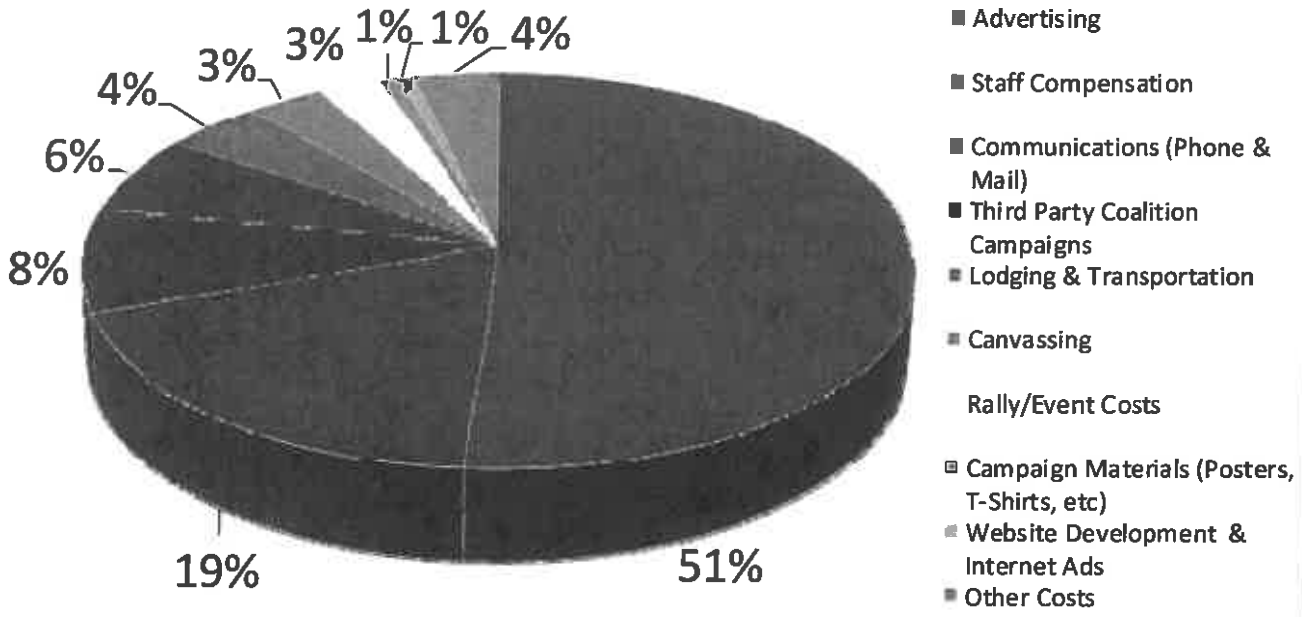
* "Union Groups" includes 1199/SEIU & GNYHA Healthcare Education Project, United Teachers (NYS) United Federation of Teachers (NYC), United University Professions, Public Employees Federation, Civil Service Employees Association, and two third-party coalitions that received funding from these groups: the Alliance for Quality Education and New Yorkers for Fiscal Fairness

** "Business Groups" includes the Business Council of New York State, Bankers Association (NY), Real Estate Board of New York, Partnership for New York City, Buffalo-Niagara Partnership, Rochester Business Alliance, and a third-party coalition funded by upstate business organizations called "Unshackle Upstate".

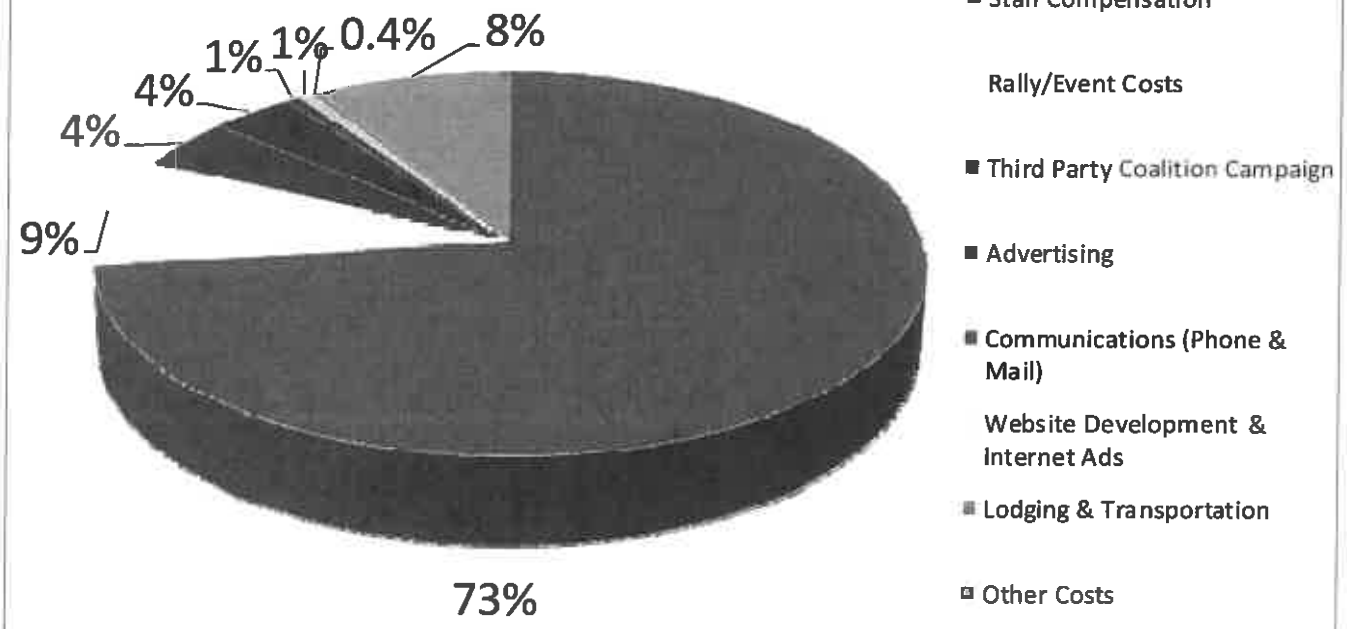
*** "Grassroots Expenditures" includes advertising, funding third party coalitions, canvassing, internet, and phone/postal costs.

Breaking down the spending patterns further, organized labor's lobbying expenditures from 2005-2010 reflect a diverse array of election-style grassroots campaign strategies at work. Just over half of the spending went to advertising while 19% went to staff compensation, a category that represents traditional lobbying. The other third of the labor spending went to a variety of other activities including voter direct outreach via mailing and phone banking, funding third-party coalition groups, canvassing, and holding large rallies in Albany.

Union Groups: Expenditures by Type 2005-2010



Business Groups Expenditures by Type 2005-2010



In contrast, more than 70 percent of business group spending from 2005-2010 went to staff compensation. This indicates a continued reliance on the traditional methods of direct lobbying: hiring well-heeled lobbyists to meet with legislators and the executive. The second highest category of business spending – 9 percent on "rally/event costs" – is almost entirely accounted for by the Business Council of New York State's annual conferences and dinners, another more traditional form of lobbying through special access to officials.

The small amount of business group advertising from 2005-2010 is mostly due to the efforts of the Buffalo Niagara Partnership, Rochester Business Alliance, and smaller upstate business groups to organize the "Unshackle Upstate" campaign beginning in 2006.[24]

Unshackle Upstate seeks the typical goal of a business-backed campaign: an improved "business climate" through reductions in allegedly burdensome taxes and regulations. The campaign's methods, however, were hardly typical for organized business lobbying in New York State. The group spent over $400,000 on advertising and over $200,000[25] to develop a sophisticated grassroots presence through rallies and social media, making it a forerunner to the statewide business community's united effort behind the Committee to Save New York.

2011 - 2012: ORGANIZED BUSINESS ENTERS THE FRAY

In 2011, the organized business lobbies adopted the strategies of election-style grassroots campaigning through the Committee to Save New York.

"This isn't about rolling the Legislature. It's about persuading the public to your side...Cuomo's side and all sides in the upcoming budget debate will be making their case to the public, using every tool they have -- running ads, generating stories and blog hits, mobilizing their constituencies, engaging voters. It's the reality of doing these fights now."

- Valerie Berlin, Berlin Rosen Public Affairs[26]

Beginning in 2011, organized business interests in New York State abruptly shifted from a longstanding focus on traditional lobbying to adopt grassroots advertising and campaign techniques through a new third-party coalition, the Committee to Save New York.

Although his spokespeople deny that Cuomo engages in "direct coordination"[27] with the Committee to Save New York since becoming Governor, it is clear from reported statements made during the campaign that the Committee was organized largely at his behest as a means of countering the perceived power of the unions.

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[24] See the Rochester Business Alliance's 2006 description of the Unshackle Upstate campaign at http://www.rochesterbusinessalliance.com/web/2006/10/unshackle_upstate.aspx. See list of Unshackle Upstate campaign partners at http://unshackleupstate.com/partners/.

[25] From 2006 to 2008, the Unshackle Upstate campaign's expenditures were reported through the filings of Buffalo Niagara Partnership and Rochester Business Alliance. In 2009, Unshackle Upstate registered as an independent lobbyist and began reporting its own expenditures.

[26] As quoted in Vielkind 2011, *id*

[27] Confessore & Kaplan 2011, *id*

From lobbying reports filed by the Business Council of New York State, it appears that planning for the Committee may have begun in early 2010. After never reporting any significant spending on consultants, the Business Council reported an expense of $121,644 to DKC Public Relations, a firm whose managing director John Marino is identified in press reports as a member of Governor Cuomo's "inner circle."[28] The Business Council also brought in well-known conservative campaign strategists Joseph Coletti[29] and Korinne Kubena, a former aide to Karl Rove at the Bush White House.[30]

In an interview with Crain's New York Business, Kenneth Adams, then President and CEO of the Business Council of New York State,[31] described the Committee to Save New York as a $10 million "war chest to have the resources so we can do advertising and communicate this message across the state that these reforms have to happen now...Everybody wants to get together to promote the reform agenda of Gov. Cuomo."[32]

The Committee to Save New York united the upstate business interests that already had experience in third-party coalition campaigning through the "Unshackle Upstate " effort with powerful New York City business lobbies like the Partnership for New York City and Real Estate Board of New York. Representatives of individual corporations like Tishman-Speyer and CB Richard Ellis sit on the board of directors and are reported to contribute financial support to the Committee.[33]

The impact of the Committee's entry into New York's political scene is dramatic. Instead of being outspent 8 to 1, business groups nearly equaled the total spending and grassroots presence of the labor groups during the January-April 2011 budget season.

More than 90% of this surge in organized business spending came from the Committee to Save New York as organizations like the Business Council and REBNY seem to have reduced their individual lobbying, perhaps refocusing their efforts through the Committee.

Another factor in the shift in the spending balance was Governor Cuomo's strategic move to "flip" the 1199/SEIU & GNYHA Healthcare Education Project to his side by working with the groups on the Medicaid Redesign team to craft healthcare cuts that will limit the damage to their interests.[34]

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[28] Daily News Staff. "Governor Hopeful Andrew Cuomo's Team on the Road to Albany." New York Daily News. May 24th 2010. http://articles.nydailynews.com/2010-05-24/news/27065221_1_andrew-cuomo-schumer-adviser.

[29] See conservative policy consultant Joseph Coletti's biography at http://www.carolinajournal.com/cjcolumnists/display_author.html?id=167

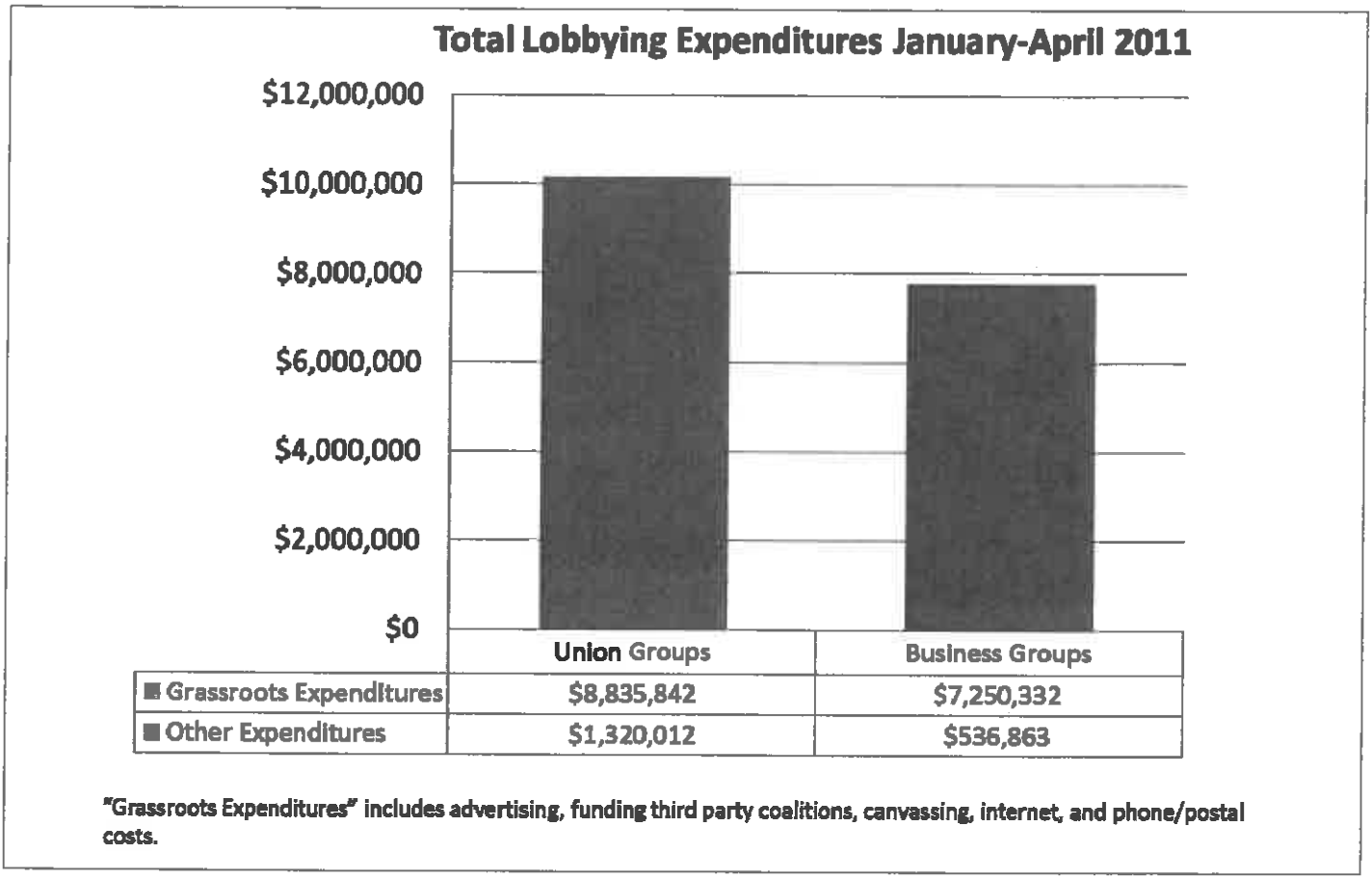
30 Azi Paybarah. "Bloomberg Adds Republican Operatives Too." The New York Observer. February 4, 2009. http://www.observer.com/1811/bloomberg-adds-republican-operatives-avella-kubena

[31] In January, 2011, Governor Cuomo appointed Ken Adams President and CEO of the Empire State Development Corporation.

32 Massey 2011, *id.*

[33] See the list of the Committee to Save New York's board members at http://www.letsfixalbany.org/board-members.

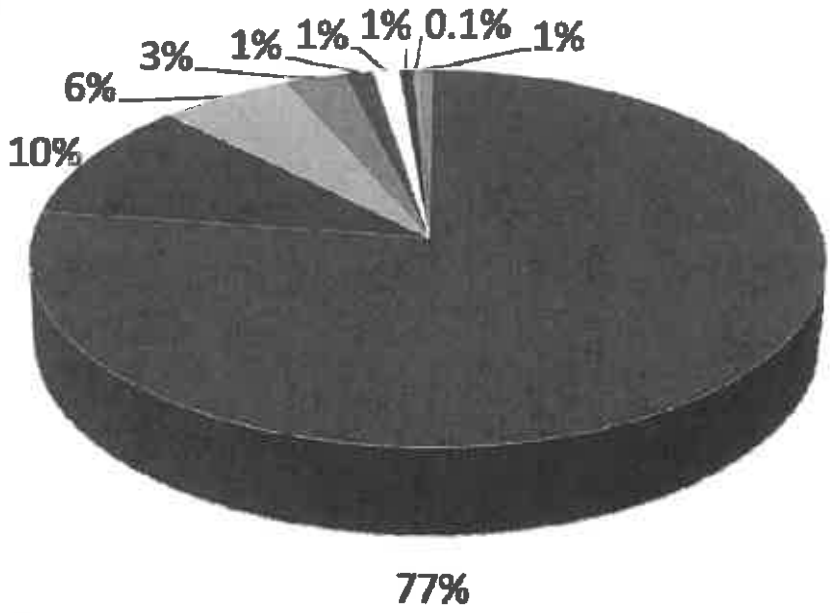
[34] Brendan Scott and Fred Dicker. "Gove and health bigs forge Medicaid deal." The New York Post. February 25, 2011. http://www.nypost.com/p/news/local/gov_and_health_bigs_forge_medicaid_OvOOAOL1jgjCBmplovDuCK



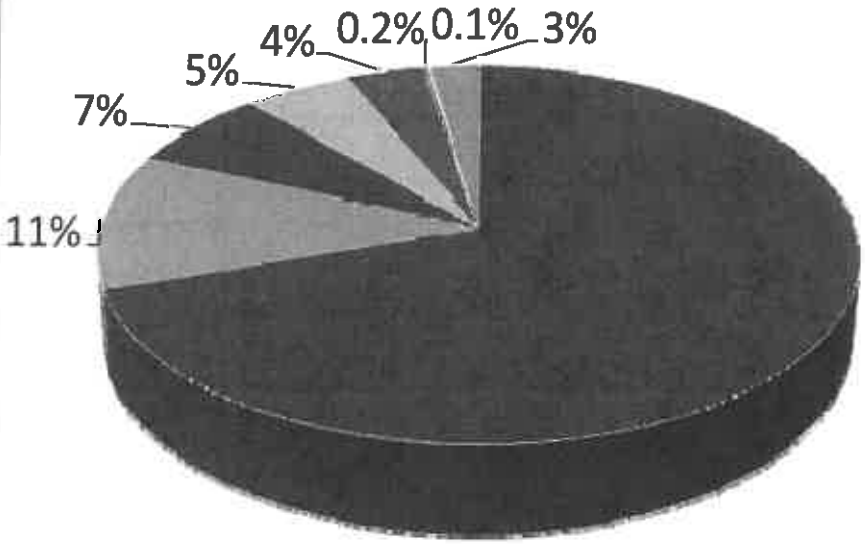
Looking deeper at the spending patterns in January-April 2011, it becomes clear that the Committee to Save New York represents a paradigm shift in lobbying by the statewide organized business community.

From 2005-2010, organized business overwhelmingly focused on traditional direct lobbying but in January-April 2011, following the lead of organized labor, the majority of spending went to advertising and a third went to grassroots base-building strategies of canvassing and internet social media.

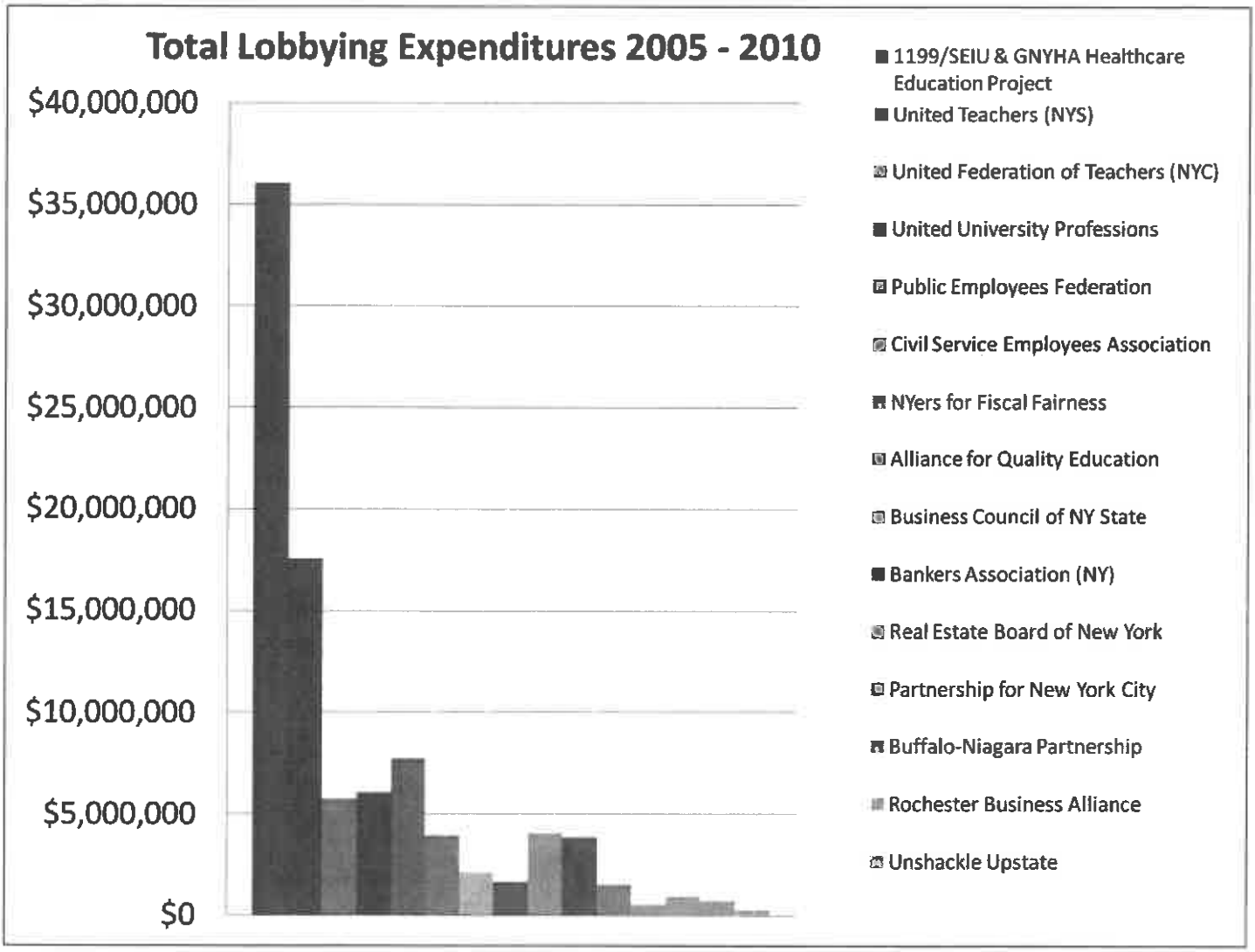
Union Groups: Expenditures by Type: Jan-Apr 2011



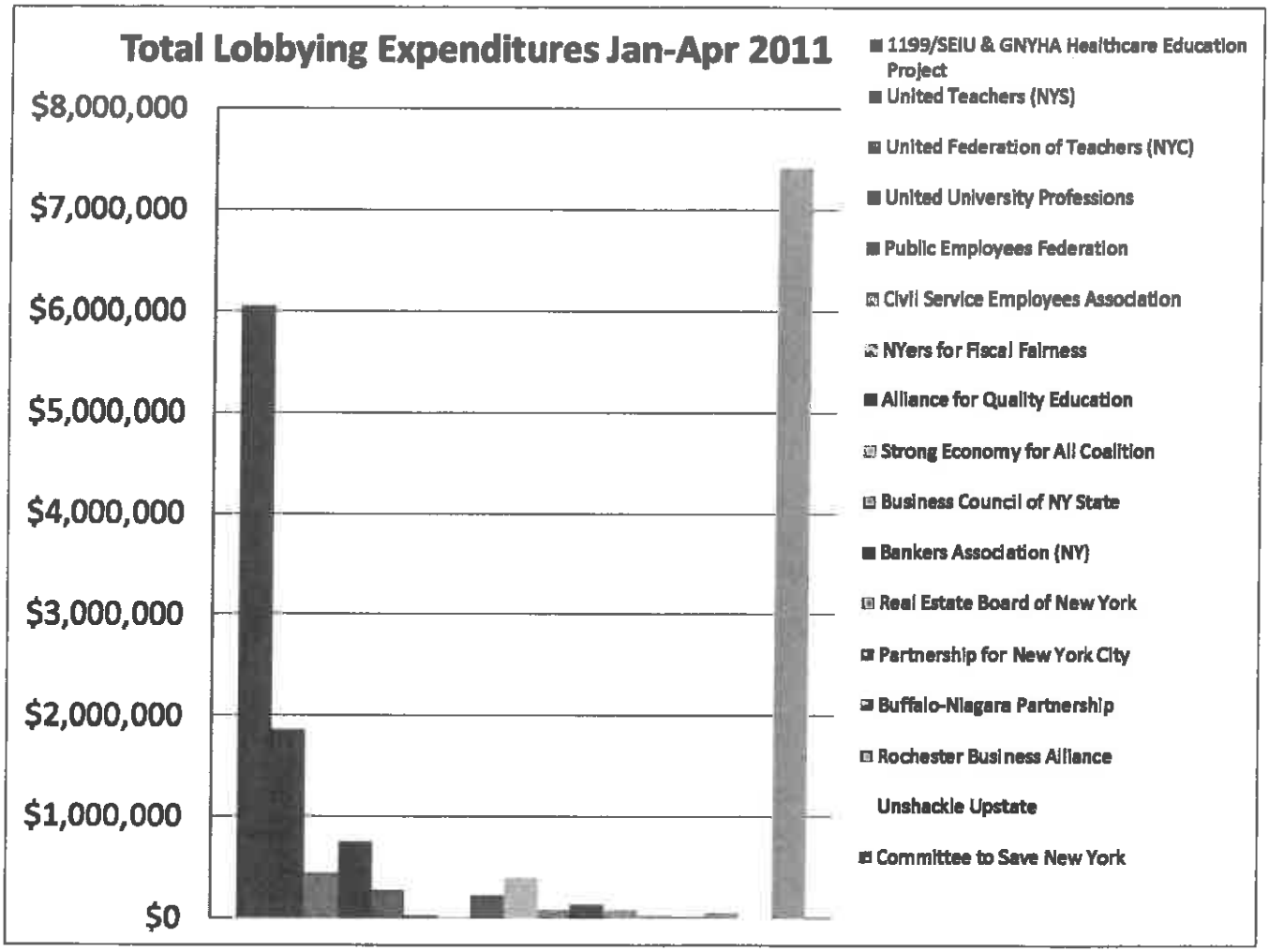
Business Groups Expenditures by Type Jan-Apr 2011



Comparing the expenditures of our selected group of union and business-backed organizations from 2005-2010 and from January-April 2011 reveals that Governor Cuomo's strategy to organize the business community was strikingly successful.



During 2005-2010, there was no organization among the statewide business interests that could even come close to matching the spending of labor groups like the 1199/SEIU & GNYHA Healthcare Education Project and the NYS United Teachers.



But during budget season 2011, the Committee to Save New York emerges as the top spender in the state.

The rise of the Committee to Save New York marked an escalation in the already inflated scale of lobbying and the use of sophisticated campaign-style tactics. The business community's adoption of the third-party campaign coalition strategy adopted earlier by the unions, and on a smaller scale, by non-profits, such as environmental protection groups,[35] demonstrates how it has become an increasingly common and effective way for powerful interests to influence legislative outcomes.

Organized labor groups sought to match the Committee by increasing funding of their own third party groups, New Yorkers for Fiscal Fairness and Alliance for Quality Education,[36] as well as organizing a new group called the "Strong Economy for All Coalition."[37] With a reported $5 million bankroll,[38] the Strong Economy for All Coalition began campaigning in March with advertisements targeting specific state senators to support the extension of

[35] See, our April, 2011 report, "Deep Drilling, Deep Pockets", which examines lobbying expenditures by both the natural gas industry and also by environmental groups.
[36] Michael Gormley. "Analysis: NYSUT, Alliance for Quality Education ready to protect school funding." The Saratogian. January 23, 2011. http://www.saratogian.com/articles/2011/01/23/news/doc4d3b927413f2f105643990.txt
[37] Confessore 2011, *id*
[38] $5 million budget for the Strong Economy for All Coalition reported by New York Times reporter Nicholas Confessore.

the millionaire's tax.[39] Like the Committee to Save New York, the group announced plans to engage in advertising, canvassing, and social media to build a grassroots base to bring pressure on lawmakers to support or oppose specific legislative proposals.[40]

Do these advertising materials give any indication of the interests behind the campaign?

The Strong Economy for All Coalition spent roughly $400,000 during the 2011 budget season -- less than what was expected considering the reported $5 million in funding the organization received.[41] This was perhaps due to the surprising speed with which the Governor and Legislature reached a deal on the state budget, which effectively cut off the coalition's opportunity to campaign after less than two weeks in action.

Like the Committee to Save New York, the Strong Economy for All Coalition is not required to disclose its funders on any of its advertisements or campaign literature. New Yorkers are completely in the dark regarding who is paying—and who stands to benefit from—these multi-million dollar grassroots election style campaigns that duke it out over the airwaves, the internet, the phone lines, and our very doorsteps.

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[39] Nick Reisman. "Groups Start Ad Blitz for Millionaire's Tax." Politics on the Lower Hudson. March 22, 2011. http://polhudson.lohudblogs.com/2011/03/22/groups-start-ad-blitz-for-millionaires-tax/

[40] Confessore 2011, *id*

[41] In the spirit of full disclosure, Common Cause/NY collaborated with the Strong Economy for All Coalition as part of the "May 12th Coalition" that published a report and organized a large demonstration in support of revenue raising alternatives to New York City budget cuts.

The Committee to Save NY and the Strong Economy for All Coalition continued to battle over fiscal issues like the local property tax cap and the extension of the state "millionaire's tax" throughout 2011. The Committee ended the year as the top lobbying spending in New York with a total of $11.9 million in expenses. The Strong Economy for all Coalition ended the year with just over $600,000 in expenses as its activities shifted from advertising to grassroots base-building.

The Strong Economy for All Coalition officially reported very little of its activities in 2012 as lobbying, registering a total of less than $10,000 in expenses for the year. Yet the group was still quite active at the grassroots level, raising further questions about the state's definition of "lobbying" and what should or should not be disclosed as such.

The Committee to Save New York continued to spend heavily in the first half of 2012 to support the Governor's budget and "Tier VI" pension reform efforts[42]. The Committee spent roughly $4.16 million on lobbying in the first half of 2012, almost entirely on advertising.

But in June 2012, the Committee to Save New York and Governor Cuomo were rocked by the revelation that gambling interests – the New York Gaming Association and Genting Berhad – had donated $2.4 million[43] of the Committee's funds. And on July 1st 2012, new ethics rules began to require donors to 501 (c) 4 organizations like the Committee to disclose their donors.[44]

In the second half of 2012, the Committee reported only $4,240 in expenses and has virtually shut down its operations in 2013. The combination of increasing negative press around the Committee and the desire of the powerful interests behind it to remain anonymous appear to have influenced this decision. The Wall Street Journal recently quoted an anonymous source "familiar with the committee" stating "The contributors to the committee are not crazy about [it] being the poster child for anonymous influence-peddling.[45]"

Instead of using the Committee to Save New York to support his 2013 agenda, Governor Cuomo is seeking to raise $5 million via the New York State Democratic Committee to run similar advertising[46]. These funds would, of course, be fully disclosed via the standard campaign finance reporting – although it will still be possible for donors to hide behind an LLC.

It thus appears that the required disclosure of donors to 501 (c) 4 groups is putting the brakes, at least temporarily, on the growth of the grassroots war between business and labor to influence fiscal policy.

Widespread adoption of requirements that 501 (c)4 groups engaging in lobbying disclose their larger donors could, potentially, influence and perhaps slow, the use of campaign-style tactics to influence public policy.

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[42] http://polhudson.lohudblogs.com/2012/03/12/committee-to-save-new-york-hits-airwaves-on-tier-vi/
[43] http://www.nytimes.com/2012/08/01/nyregion/ethics-panel-says-pro-cuomo-lobby-may-shield-donors-names.html
[44] The Public Integrity Reform Act of 2011 ("PIRA") (Chapter 399, Laws of 2011) included the source of funding disclosure requirement set forth in Legislative Law §1-h(c)(4) and §1-j(c)(4).
[45] http://online.wsj.com/article/SB10001424127887323384604578326674281942036.html?mod=googlenews_wsj
[46] http://www.nydailynews.com/blogs/dailypolitics/2013/02/gov-cuomo-seeking-to-raise-5-million-for-ads-supporting-his-agenda

GRASSROOTS CAMPAIGN TACTICS INCREASINGLY USED TO PROMOTE OR ATTACK INDUSTRY/TRADE-SPECIFIC LEGISLATION

In addition to the business backed (Unshackle Upstate, Committee to Save New York) and labor backed (New Yorkers for Fiscal Fairness, Strong Economy for All Coalition) coalitions battling over fiscal policy, New York has also seen significant growth in the number of third party coalition "veiled actors" formed to promote or attack specific policies.

In recent years, such groups include the following:

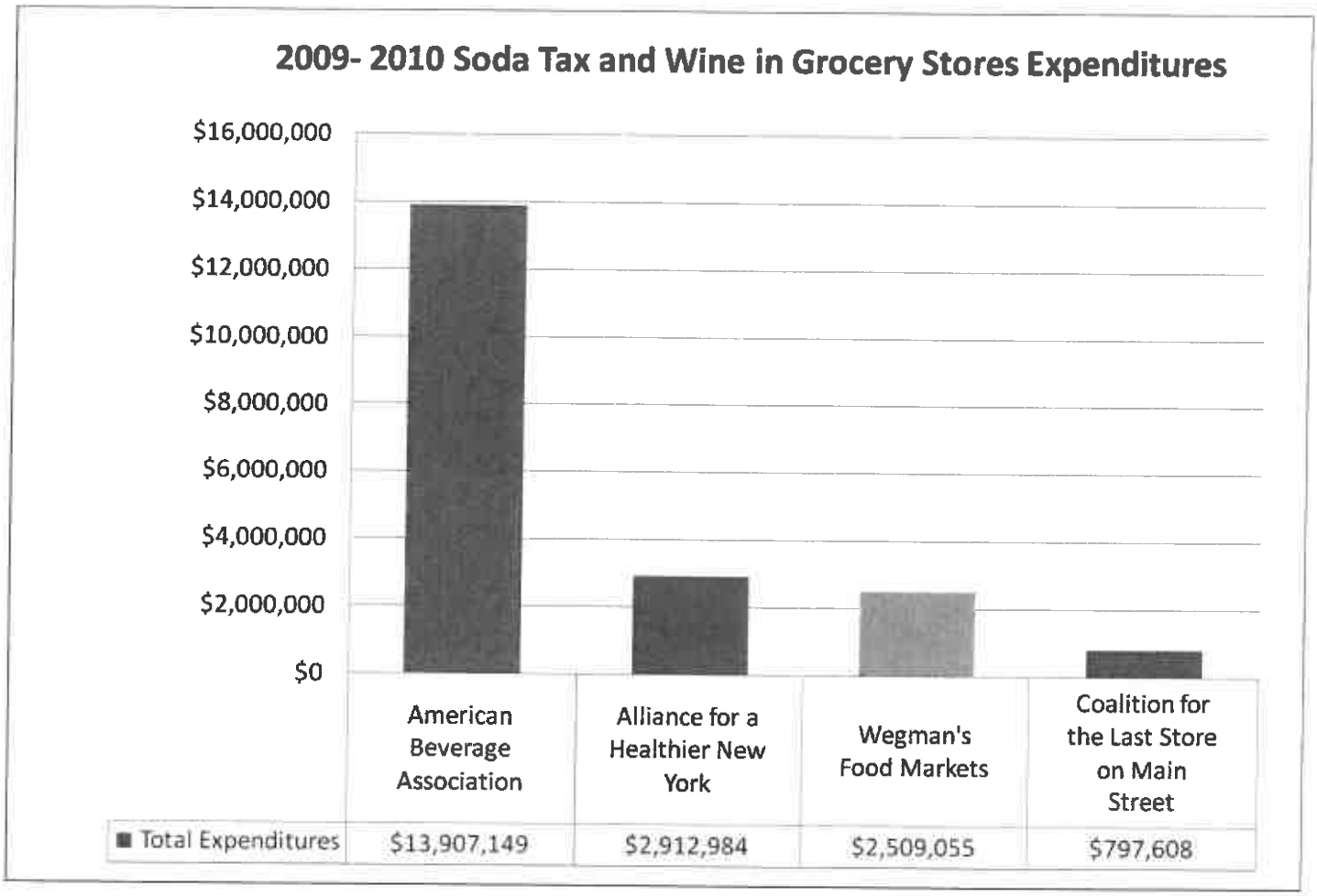
- The "Alliance for a Healthier New York," backed by 1199/SEIU and registered as an independent lobbyist in 2010 in support of Governor David Paterson's proposed tax once cent per ounce tax on soft drinks[47] (website no longer available)
- The American Beverage Association sponsored a coalition against the soda tax called "New Yorkers Against Unfair Taxes" and reported the coalition's expenditures through its own filings, although the name of the coalition is not mentioned in the filings (http://www.nobeveragetax.com/)
- "Coalition for the Last Store on Main Street" registered as an independent lobbyist in 2009, a statewide coalition of liquor stores lobbying against wine in grocery stores. (http://www.lastmainstreetstore.com/)
- Wegman's Food Markets sponsored a third party coalition called "Vote Wine 2009" in support of wine in grocery stores and reported the coalition's expenses through its own filings. In 2010, the coalition was renamed "New Yorkers for Economic Growth and Open Markets." (http://www.newyorkersforeconomicgrowth.com/)
- "Keep NYC Congestion Tax Free" is a coalition of Brooklyn and Queens-based businesses, trade organizations, and community groups that oppose Mayor Bloomberg's plan to establish a toll for vehicles entering Lower Manhattan during the workday (http://www.keepnycfree.com/)
- The "SHARE" (Safe, Healthy, Affordable, Reliable, Energy) Coalition is a campaign undertaken by Entergy (the owner of the Indian Point nuclear power plant) to build grassroots support for nuclear energy as an alternative to fossil fuel power. The coalition claims support of 25 nonprofit groups such as the National Minority Business Council and South Bronx Board of Trade (http://shareny.org/aboutus).
- "Clean Growth Now" is a campaign backed by the natural gas industry and business organization to push for allowing fracking in New York State. (http://www.cleangrowthnow.org)

The 2009-2010 lobbying battles over Governor Paterson's proposed budget measures of a soda tax and wine in grocery stores are an excellent case study. Coalitions in support and opposition to these measures spent over $17 million in 2010, as detailed in the discussion below.

On the soda tax issue, the 1199/SEIU & GNYHA-backed "Alliance for a Healthier New York" supported the Governor, while the American Beverage Association campaigned against the tax under the name "New Yorkers against Unfair Taxes."

[47] http://www.nydailynews.com/new-york/governor-paterson-proposes-obesity-tax-tax-non-diet-sodas-article-1.354521

On the wine in grocery stores issue, coalitions of supermarket interests sponsored primarily by Wegman's Food Markets campaigned under the names "Vote Wine 2009" and "New Yorkers for Economic Growth and Open Markets" and faced off against a group called "Coalition for the Last Store on Main Street" backed by the state's liquor stores.



The second interesting aspect to the beverage battle is the precedent setting example of the Governor encouraging the formation of a third-party coalition to advance a legislative agenda. Although the effort was ultimately unsuccessful, the Alliance for Healthier New York was formed by 1199/SEIU and GNYHA to campaign in favor of the soda tax when Governor Paterson promised that revenues from the tax would go to offset cuts in state health care spending.[48] A year later, Governor Cuomo employed the same strategy when enlisting the business community to organize the Committee to Save New York to advertise on behalf of his budget proposals.[49]

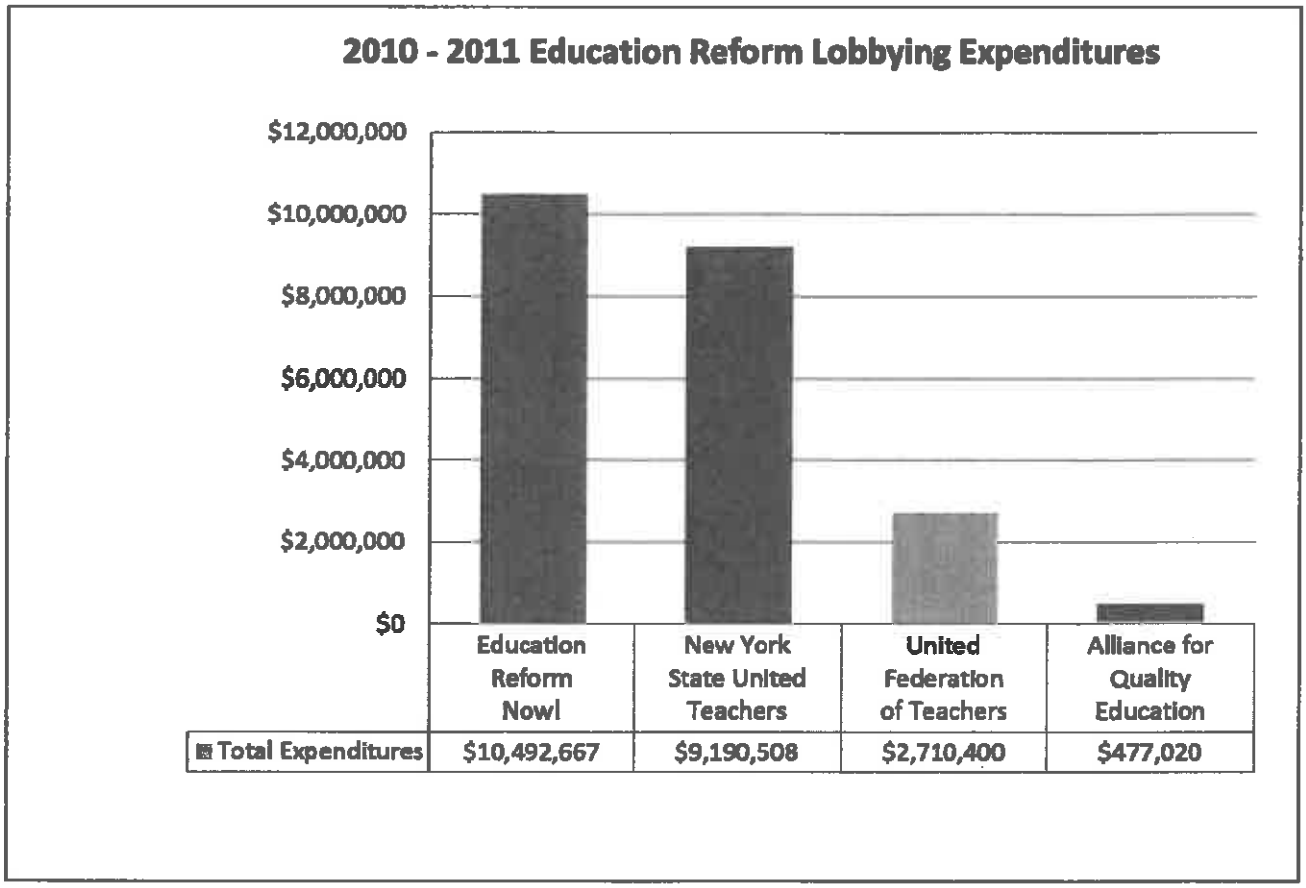
The other major grassroots lobbying battle that helped fuel the advertising spending of 2010 was the fight between the teachers' unions and a nonprofit advocacy group called Education Reform Now

[48] Hartocollis, *id,* and Celeste Katz, "A 'Life or Death Tax.'" New York Daily News "Daily Politics" Blog. February 22, 2010. http://www.nydailynews.com/blogs/dailypolitics/2010/02/a-life-or-death-tax.html

[49] Confessore & Kaplan 2011, *id* ; Massey 2011, *id*

(http://www.edreformnow.org/) over the issue of "last in, first out" teacher seniority policies, raising the cap on charter schools, and other "education reform" issues.

Education Reform Now is a national 501 c(4) organization that can be considered a "veiled actor" because the group's advertisements and campaign materials obscure the fact that it is funded by charter school supporters and those with a vested interest in the growth of charter schools. In both 2010 and 2011, Education Reform Now undertook a major New York advertising campaign in support of changes to state education policy, spending nearly $10.5 million in total.[50]



In response, the teachers unions undertook an advertising campaign of their own[51]. The United Federation of Teachers had to significantly increase its lobbying spending, cracking the $1 million mark for the first time in the organization's history in 2010 and hitting nearly $1.5 million in 2011.

Since 2011, Education Reform Now has not been active in advertising in New York. But a new education reform organization called "Educators 4 Excellence" has rapidly grown with the help of Education Reform Now[52]. In 2013, it is now Educators 4 Excellence that is taking the lead in airing advocacy advertising calling on Albany to initiate "reforms" like teacher evaluations[53]. Despite playing virtually the same role that Education Reform Now

[50] http://gothamschools.org/2011/02/10/education-reform-now-debuts-anti-seniority-television-ads/ http://www.youtube.com/watch?v=H9RTxXjfB_w&NR=1

[51] **http://www.youtube.com/watch?feature=player_embedded&v=J7KqfEf7-74)**

[52] http://www.edreformnow.org/ERN%202010.pdf

[53] http://www.educators4excellence.org/multimedia/video?video_id=22

played in 2010 and 2011, Educators 4 Excellence is not registered as a lobbyist in New York State. The organization's website captions an embed of its" first ever TV ad" with this description: "In this 30-second commercial, three NYC teachers call on Albany to implement a meaningful evaluation system." Educators 4 Excellence's failure to register as a lobbyist is inexplicable.

Rise of Independent Expenditures and Veiled Actors in New York Post *Citizens United*

New York, with high profile congressional races and a closely divided state senate is a microcosm of campaign developments seen at the federal level and across the country[54]. In the 2012 election, independent expenditures in both congressional and state legislative races may well have played the decisive role.

Because New York was a swing state for congressional races in 2012, large amounts were spent on independent expenditures in the competitive New York congressional races. While the candidates for the 27th congressional district outside Buffalo (Hochul-Collins) spent almost over $4.25 million, independent expenditures by Super PACs and advocacy groups totaled $4.48 million.[55] Of the approximately $8.8 million spent on the election in the 19th Congressional district in the mid-Hudson (Gipson-Schreibman), the $5.3 million spent by outside groups represents more than half the total amount spent on the race.[56] In Westchester's 18th Congressional District (Maloney-Hayworth), outside groups spent $5.4 million, while outside groups spent $5.5 million on the Bishop-Altschuler race in the 1st Congressional District on Long Island.[57]

In five hotly contested New York state senate races, with majority control of the senate hanging in the balance, Republican candidates vastly out-spent Democratic candidates, in some cases by as much as four-to-one. Yet, in those five crucial races, the Democratic candidate won, bolstered by significant independent expenditures by New York State United Teachers (NYSUT), a teachers' union,[58] and two newly formed PACs.[59] Ironically, those PACs both have the avowed purpose of supporting candidates who want to change the current campaign finance system.[60] As one law firm blogger noted, "the undeniable impact of independent campaign spending in New York's 2012 State Senate elections could impact the way that future campaigns are run."[61]

The outside spending also encompassed increased spending by groups that are best described as "dark money" groups" – groups with innocuous sounding names ("Common Sense Principles" or VOTE/COPE). VOTE/COPE, as

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[54] For examples, The Los Angeles Times, in a critical March 1 editorial, reported that a record high of more than $7.8 million was spent by outside groups on the combined Los Angeles city and school board races during the just conducted primary. " L.A.'s tide of political money," Los Angeles Times, March 1, 2013. http://articles.latimes.com/2013/mar/01/opinion/la-ed-campaign-finance-20130301.

[55] "Hochul rules race for campaign cash," Buffalo News, Oct.27,2012; "$128M spent on House races in New York", Rochester Democrat & Chronicle, February 18,2013.

[56] "$128M spent on House races in New York", Rochester Democrat & Chronicle, February 18,2013.

[57] Id.

[58] "NYSUT spent $4.5M to be heard at the polls", Times Union, Nov.14, 2012. http://www.timesunion.com/local/article/NYSUT-spent-4-5M-to-be-heard-at-the-polls-4038821.php#ixzz2MoXIBrUc.

[59] "The high cost of winning (and losing)," New York World, Nov. 14, 2012.

[60] Id.

[61] Michael Fallon, "Independent Spending Reshapes State Senate," Nov.14,2012. **New York Ethics, Lobbying and Election Law Compliance Blog – Hinman Straub.**

it turns out, is the political arm and funded by NYSUT, a teachers' union. Common Sense Principles, on the other hand, is truly a dark money operation.

After Common Sense Principles sent inflammatory and misleading mailers about three Democratic candidates for state senate into their districts, it quickly became apparent that there was no way to determine who was behind the organization. The organization listed its address as a Virginia post office box and its website does not provide any information about who is involved in the organization. News reports have linked the organization to various individuals active in the Republican party.[62] While anyone would recognize the mailers as campaign materials, the organization, a 501(c)(4) reported its spending as lobbying expenses.

The Board of Elections was mandated by the Public Integrity Reform Act of 2011[63] to issue regulations that clarify the requirements for individuals and entities to disclose amounts spent on independent campaign expenditures that expressly identify a political candidate and are not coordinated or approved by the candidate. Although good government groups and others urged the Board of Elections to include language to insure that functional equivalents of express advocacy for election or defeat of a candidate are covered,[64] the Board failed to do so. Common Sense Principles simply exploited that loophole in the law. By doing so, Common Sense Principles evaded the requirements for disclosure of expenses or contributors prior to the election.

As a putative lobbying entity which lobbies on its own behalf and not on behalf of a client, Common Sense Principles is subject to the requirement, also adopted in PIRA, that any donor contributing $5,000 or more to support its lobbying must be disclosed. Examination of Common Sense Principles' filing pursuant to the requirement reveals that it is funded exclusively by Common Sense Principles LLC.[65] New York law has no provisions which would require further disclosure or support government investigation or action into the actual backers of Common Sense Principles LLC.

Without the adoption of creative solutions to the Dark Money challenge presented by Common Sense Principles in New York law, we can expect to see similar organizations exploiting these weaknesses and loopholes in the law, to game the system and evade timely disclosure or any meaningful disclosure at all.

RECOMMENDATIONS

In 1954, in *U.S. v. Harris,* the U.S. Supreme Court held that expenditures that "relate largely to the costs of a campaign to induce various interested groups and individuals to communicate by letter with members of Congress on [] legislation"[66] were appropriately subject to disclosure under the federal Lobbying Act. In arriving at that conclusion, the Court expressly recognized that Congress could appropriately seek disclosure of those

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[62]" Attack Ads, by Outside Groups With Murky Ties, Shape 3 New York Senate Races," New York Times, October 16, 2012.

[63] Chapter 399 of the Laws of 2011.

[64] Part E of PIRA provides: "The state board of elections shall, no later than January 1, 2012, issue regulations setting forth and implementing the require ments under existing law for individuals, organizations, corporations, political committees, or any other entities to disclose independent expenditures made for advertisements or any other type of advocacy that expressly identifies a political candidate or ballot proposal. Such regulations shall require such disclosure to the fullest extent of the law."

[65] "Drumroll: Common Sense Principles lists its donor," Capitol Confidence Blog, Times Union, February 6, 2013.

[66] United States V. Harriss, 347 U.S. 612, 615 (1954).

who spent money to put pressure on it through "an artificially stimulated letter campaign." [67] In the Court's words,

> "Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."[68]

The holding of *U.S. v. Harris* has expressly been applied to reject a constitutional challenge to the provisions of New York's Lobbying Law that cover both direct and indirect grassroots lobbying.[69]

In proposing changes to New York's Lobbying Law to address the rise in campaign-style lobbying expenditures and the increasing use of third-party coalitions and other veiled actors, we are mindful of the following public policy goals of lobbyist regulation:

> [C]arefully crafted lobbyist rules should address five concerns of great importance to democratic institutions. The rules governing lobbyists should ensure (1) that all persons have a fair opportunity to be heard by the government, (2) that government enjoys the confidence of the people, (3) that official decisions are based on accurate information, (4) that the citizenry knows how the government operates and (5) that the performance of public business benefits from the wisdom of the community.[70]

PROBLEM # 1:

"We don't have to report it, so why tell you?"

Steven Spinola, President, Real Estate Board of New York, to New York Times reporter Charles Bagli regarding donations to the Committee to Save New York.[71]

Since New York's lobbying law does not directly address grassroots lobbying, different entities have reported their grassroots lobbying campaigns differently or not at all.

Among the organizations reviewed for this paper, there is no consistency whatsoever regarding disclosures of contributions to third-party campaigns in New York State lobbying reports.

Examples:

- While NYSUT and the Public Employees Federation report their contributions to the New Yorkers for Fiscal Fairness campaign, the Civil Service Employees Association does not.
- The sponsors of the Committee to Save New York, such as REBNY, Buffalo-Niagara Partnership, and Tishman Speyer Properties, do not report their contributions to the organization.
- From 2006-2008, the Unshackle Upstate campaign's expenses were reported through the filings of the Buffalo-Niagara Partnership. The Rochester Business Alliance reported its contributions to

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[67] *U.S. v.Harriss*, op.cit. at 620

[68] *Id.*at 625.

[69] *Commission on Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying*, 534 F.Supp. 489, 491 (N.D.N.Y. 1982).

[70] Vincent R. Johnson, Regulating Lobbyists: Law, Ethics and Public Policy, 16 Cornell J.L. & Pub. Policy 1,13 (2006).

[71] Charles Bagli. "Business Group Prepares to Counter Unions." The New York Times. January 7, 2011. http://www.nytimes.com/2011/01/08/nyregion/08save.html?_r=1

Unshackle Upstate as payments to Buffalo-Niagara. But in 2009, Unshackle Upstate was registered as an independent entity under the name "Rochester Business Alliance (FKA Unshackle Upstate)," and began to report its expenditures through this new entity. Buffalo Niagara Partnership and Rochester Business Alliance no longer reported any contributions to the campaign on their own filings.

- In 2010, the American Beverage Association reported its expenditures for the campaign against the soda tax entirely under its own name even though many of its advertising materials ran under the name "New Yorkers Against Unfair Taxes." There is no mention of the name "New Yorkers Against Unfair Taxes" in American Beverage Association's disclosures; the campaign expenditures are described only as "strategic advocacy" paid to the firm Goddard Claussen.
- In 2010 and 2011, Education Reform Now, a national 501(c)4 organization reportedly funded by charter school supporters undertook a major New York advertising campaign in support of changes to state education policy, reporting their activities as lobbying. A new entity, Educators for Excellence is now running very similar advertising in New York, but has not registered as a lobbyist.

CURRENT NY LAW:

New York's Lobbying Act, N.Y. Legislative Law §1(c) (c), contains an extensive definition of "lobbying".

The statutory language is quite broad in covering "any attempt" to influence a long list of official actions. Federal and New York courts have interpreted lobbying to include both direct and indirect lobbying. United States v. Harriss, 347 U.S. 612, 615, 620, 74 S. Ct. 808, 810, 813, 98 L. Ed. 989 (1954); Commission on Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying, 534 F. Supp. 489, 3 Ed. Law Rep. 554 (N.D. N.Y. 1982) (applying New York law). Nevertheless, many entities have not registered or disclosed their grassroots lobbying expenditures. As noted above, all contributors to the Committee to Save New York do not disclose their expenses in their lobbying filings. And the Committee itself only registered as a lobbyist after being publicly chided to do so.[72]

RECOMMENDATION:

With the increasing use of grassroots lobbying campaigns, expressly defining grassroots lobbying and specifically including grassroots campaigns within the purview of the Lobbying Act will re-enforce the importance accorded to the need for improved disclosure of this type of lobbying.

A particularly clear definition is contained in a federal lobbying bill from 2005, which defined grassroots lobbying as the following:

> "...an attempt to influence legislation or executive action through the use of mass communications directed to the general public and designed to encourage recipients to take specific action with respect to legislation or executive action, except that such term does not include any communications by an entity directed to its members." *Special Interest Lobbying and Ethics Accountability Act of 2005, H.R. 2412, 109th Cong. § 106(a); Lobbying and Ethics Reform Act of 2005, S. 1398, 109th Cong. § 106(a).* Unfortunately, this bill did not become law.

[72] Jimmy Vielkind. "'Save' Group Bows to Pressure." Albany Times-Union. January 19, 2011. http://www.timesunion.com/default/article/Save-group-bows-to-pressure-964648.php

The State of Washington's laws require those who expend more than $500 in grassroots lobbying to report their expenditures, defining a grassroots lobbying campaign as "a program addressed to the public, a substantial portion of which is intended, designed, or calculated primarily to influence legislation." . *Rev. Code Wash. (ARCW) § 42.17.200 (2011).*

According to Connecticut law, "'Lobbying' means communicating directly or soliciting others to communicate with any official or his staff in the legislative or executive branch of government or in a quasi-public agency, for the purpose of influencing any legislative or administrative action..."

PROBLEM # 2

New York, like other states, is experiencing the rise of "veiled political actors," organizations, subsidiaries, or coalitions with public relations-friendly names that are used as vehicles for hiring lobbyists or conducting grassroots lobbying campaigns.

Right now, only the name of the new entity has to be disclosed on lobbying disclosure forms, rather than the name of the parent organization or interest group. This practice effectively shields the lobbying activities of the true actors from public view and subverts the purpose of the Lobbying Act. Both organized labor and organized business coalitions have used this technique.[73]

CURRENT LAW:

Since New York's lobbying laws lack clear regulations for third-party coalitions, reporting of funders in lobbying reports is completely inconsistent as described above.

RECOMMENDATION:

The identities of any organizations or individuals who own more than a token interest in any lobbying client or who provide more than $5,000 for the lobbying expenditures of the lobbying client should be fully disclosed as part of the lobbying clients' on-going lobbying disclosure requirements. <u>All</u> major entities involved in a multi-layered lobbying structure should be disclosed, including nonprofits.

On the federal level, the Lobbying Disclosure Act requires the disclosure of "the name, address, and principal place of business of any organization" that "contributes more than $5,000 toward the lobbying activities" of the registered lobbyist. The proposed Public Integrity Reform Act of 2011 contains a similar requirement of the disclosure of any single source of funding of $5,000 and above used for lobbying.

We believe that such a requirement is a good start, but that individual members of lobbying coalitions or associations that contribute $5,000 or more to the lobbying campaign, or who maintain more than a 10% ownership interest of the named client organization, should be regarded as lobbyist "clients" and required to disclose their identity, as well as any individual or entity that provides money, directly or indirectly, that is used for the lobbying campaign.

Here, again, statutory language from Washington State is instructive.

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[73] See our *"New York State Grassroots Lobbying Campaign Advertising Disclosures Report Card."* We have graded the disclosures made by the various entities that have engaged in grassroots lobbying campaigns.

"(2) Within thirty days after becoming a sponsor of a grassroots lobbying campaign, the sponsor shall register by filing with the commission a registration statement, in such detail as the commission shall prescribe, showing:
(a) The sponsor's name, address, and business or occupation, and, if the sponsor is not an individual, the names, addresses, and titles of the controlling persons responsible for managing the sponsor's affairs;" *Rev. Code Wash. (ARCW), id.*

PROBLEM #3:

Powerful interests are spending millions of dollars on grassroots campaigns to influence public opinion and legislative outcomes while hiding behind third party groups or coalitions. The Public Integrity Reform Act of 2011 now requires c4 organizations that meet certain threshold qualifications to disclose any contributor of $5,000 or more that support their lobbying. However, the information is reported on a bi-annual basis and only available after the fact on an agency website.

Third party groups like the Committee to Save New York and New Yorkers for Fiscal Fairness are not required to disclose the organizations/companies/individuals that direct and/or fund the group on advertisements, mailings to voters, and other campaign materials/messages. The increased use of such vaguely named groups or coalitions is precisely the sort of evasive tactics used by political actors who seek to avoid disclosure of the source and extent of their campaign spending, whether it is on ballot initiatives in California or on independent expenditures supporting or opposing specific candidates in federal elections. Garrett and Smith[74] refer to those who seek to evade disclosure of their political spending as "Veiled Political Actors," an apt term that has also been used in the lobbying context.[75]

As one discussion of the challenge of devising appropriate lobbying disclosures points out, "disclosure of grassroots lobbying efforts may in some ways be more important than disclosure of other lobbying activities. Because votes are the ultimate currency in politics and officials must win reelection in order to continue in their jobs, lobbyists' and interest groups' ability to demonstrate (or generate the appearance of) public support for their positions may be the most critical element in convincing elected officials to support their policy preferences."[76]

CURRENT LAW:

New York's lobbying laws lack clear regulation for third-party coalitions.

There is no requirement that information regarding the source or funding of any grassroots lobbying be included on the advertising or campaign materials. The Lobbying Act is wholly silent, as its provisions appear geared to direct lobbying.

RECOMMENDATION:

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[74] Elizabeth Garrett and Daniel A. Smith. "Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy." Election Law Journal 295, 296 (2005).
[75] Anita S. Krishnakumar. "Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation" Alabama Law Review 58 513, 552 (2007).
[76] *Id.* at 549.

Require that information on all advertising and any related websites in order to allow members of the public to understand who is trying to "artificially stimulate" communication with officials on legislation or matters of public policy.

- All advertisements, websites, and other campaign materials should display/announce the full organization name instead of an acronym.
- Each advertisement should disclose the organization's name at both the beginning and end of the advertisement.
- At the end of each advertisement, the name(s) of the organization or entity(ies) placing the ad should be at least equally prominent to any other organizational names or website addresses displayed/announced.
- The organization's full name and partners/funders (if a third-party organization) should be clearly available on the website's home page.

ADDITIONAL RECOMMENDATION:

Require that committees or coalitions that engage in grassroots lobbying costing $100,000 or more annually identify their major contributors and the sponsoring economic interests likely to be affected by the official action supported or opposed by the lobbying attempt on the communication itself.

Relevant experience with regulating veiled political actors comes from California's disclosure requirements relating to initiative campaigns.

In 1996, California voters passed Proposition 208, which, among other reforms, required that any committee supporting or opposing a ballot measure must name and identify itself using a name or phrase that clearly identifies the economic interest of its major donors of $50,000 or more that is likely to be affected by the ballot measure.

- (CA GC § 84504) This naming requirement extends to the committee's statement of organization, to any advertisement or other paid public statement made by the committee, and, in fact, to any reference to the committee required by law.
- (GC § 84504, subds. (a) and (c).) A committee primarily formed to support a measure must also identify, in any advertisement paid for by the committee, the name of the top two contributors to the committee whose cumulative contributions to the committee are $50,000 or more.
- (CA GC § 84503)This disclosure must explicitly indicate that the contributor is a major donor to the committee by stating, for example, "major funding by" or "paid for by" the contributor.

This regulatory disclosure scheme can easily be adopted to address the veiled political actor lobbying practices at work in New York. [77]

[77] Indeed, New York voters would benefit from the adoption of similar disclosures for any independent expenditures directed towards the defeat or election of candidates.

Washington State's lobbying law also provides a useful, if less detailed, model for reporting the identity of the individuals and groups behind a grassroots lobbying campaign:

- (2) Within thirty days after becoming a sponsor of a grass roots lobbying campaign, the sponsor shall register by filing with the commission a registration statement, in such detail as the commission shall prescribe, showing:
- (a) The sponsor's name, address, and business or occupation, and, if the sponsor is not an individual, the names, addresses, and titles of the controlling persons responsible for managing the sponsor's affairs;
- (b) The names, addresses, and business or occupation of all persons organizing and managing the campaign, or hired to assist the campaign, including any public relations or advertising firms participating in the campaign, and the terms of compensation for all such persons;
- (c) The names and addresses of each person contributing twenty-five dollars or more to the campaign, and the aggregate amount contributed;
- (d) The purpose of the campaign, including the specific legislation, rules, rates, standards, or proposals that are the subject matter of the campaign;" Rev. Code Wash. (ARCW) § 42.17.200 (2011).

PROBLEM #4:

Each reporting entity decides for itself how to report its expenditures. The reports are not easily comparable between reporting entities when each reporting entity provides disclosed information differently.

CURRENT LAW:

New York lacks clear regulations that require uniformity of disclosure and a website that imposes uniformity.

The Commission on Public Integrity's Guidelines provide the following:

> "Reportable expenses shall mean any expenditure incurred by or reimbursed to the lobbyist for the purpose of lobbying. Reportable expenses include, but are not limited to the following: advertising, telephone, electronic advocacy, food, beverages, tickets, entertainment, parties, receptions or similar events, advocacy rallies, consultant services, expenses for non-lobbying support staff, and courier services when said expenses are part of a lobbying effort. "

Examination of reports filed by lobbyists and by lobbying clients show a broad range of interpretation of what is required in reporting lobbying expenditures. Differences in reporting grassroots expenditures are one area in which the difference in interpretation is clearest.
Examples:

- American Beverage Association disclosed the expenditures for its campaign against the soda tax as payments to Goddard Clausen for "strategic advocacy," a very vague term that encompasses multiple grassroots techniques.
- 1199/SEIU Healthcare Education Project discloses the expenditures for its grassroots campaigns in great detail. Each payment to firms like Knickerbocker SKD and Squier Knapp Dunn Communications Inc. is attributed to a specific item such as "production and creative costs for doorhangers, posters, and mailers," or "TV Broadcast in Spanish."
- Committee to Save New York provides a mid-range level of detail, differentiating between payments for "internet advertising" and payments for "radio advertising" or "public relations."

Washington State's lobbying law again provides useful specific guidance regarding expenditures for grassroots lobbying which must be reported. The relevant provision states:

> "(e) The totals of all expenditures made or incurred to date on behalf of the campaign, which totals shall be segregated according to financial category, including but not limited to the following: Advertising, segregated by media, and in the case of large expenditures (as provided by rule of the commission), by outlet; contributions; entertainment, including food and refreshments; office expenses including rent and the salaries and wages paid for staff and secretarial assistance, or the proportionate amount thereof paid or incurred for lobbying campaign activities; consultants; and printing and mailing expenses." Rev. Code Wash. (ARCW) § 42.17.200 (2011).

In 2012, Rhode Island adopted a law, H7859, that requires disclosure of financial backers on the electioneering communication paid for by independent expenditures.

Int. 1193-2013 was introduced in November, 2013 before the New York City Council. If passed, the bill would require the disclosure of the top 5 financial backers of the electioneering communication paid for by independent expenditures on the communication itself.

RECOMMENDATION:

The Lobbying Act should be amended to require specific reporting of detailed grassroots lobbying expenditures and the website on which lobbying expenses are reported should be upgraded to require uniformity of reporting.

Amending the Lobbying Act will convey the importance of detailed and uniform reporting of this data. While issuing more specific regulations may be the most expeditious, if this approach that is not combined with a website upgrade, it leaves room for varying interpretations and defeats the goal of maximizing the uniformity and thus comparability of disclosures.

Although upgrading the CPI's website to utilize pull-down menus and more specificity in detailing expenses may incur more expense initially, this expense should be limited if properly designed. Upgrading the CPI website is essential to minimizing variability in reporting.

PROBLEM # 5:

Members of the public cannot obtain lobbying data in a user-friendly, analyzable form.

The CPI's current website is difficult and unintuitive for the average member of the public to use. There is no explanation of the difference between a "lobbyist query" and a "client query." Users are left on their own to discover that one leads to a bimonthly report filed by the lobbyist and the other to a bi-annual report filed by the client. Procuring an organization's report requires clicking through multiple confusing dialogues before arriving at the report page, which can only be printed. Reports cannot be exported to Microsoft Excel or another database program for analysis, or even directly saved as a PDF. Establishment of the Joint Commission on Public Integrity to be set up under the proposed Public Integrity Reform Act of 2011 may provide an opportunity to redesign and upgrade the lobbying disclosure website.

RECOMMENDATION:

The Lobbying Act should be amended to mandate internet disclosure of the reported lobbying data.

The website on which lobbying disclosures are made available to the public should present the information in a form that: a) is fully searchable, b) downloadable in formats used by common spreadsheet and data programs, c) permits cross-reference, and d) is user-friendly.

CONCLUSION

New Yorkers deserve an open and transparent debate on any proposed legislation. This is a core principal of democracy that all the leading voices in Albany, the business community, and the labor movement should agree on. And yet our laws governing lobbying do not comport with repeated assertions of devotion to openness. transparency

REPORT

FROM THE NEW YORK STATE JOINT COMMISSION ON PUBLIC ETHICS

FEBRUARY 2015

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I. EXECUTIVE SUMMARY

The Joint Commission on Public Ethics ("JCOPE") is an independent ethics agency that was created by the Public Integrity Reform Act of 2011 ("PIRA"). JCOPE is charged with enforcing the State's ethics and financial disclosure laws that apply to the Legislative and Executive Branches of government. Additionally, the agency is charged with enforcing the laws regulating lobbying in the State, including disclosure requirements for lobbyists and their clients. JCOPE provides advice and guidance on these laws and their accompanying regulations. It promotes compliance through educational initiatives, audits, investigations, and enforcement proceedings.

PIRA expanded JCOPE's jurisdiction and oversight responsibilities from its predecessors. Among other things, PIRA gave JCOPE jurisdiction over the members and staff of, and candidates for, the Legislature, where those responsibilities had previously been the exclusive province of the Legislature. For the first time, therefore, New York has one agency primarily responsible for the implementation and enforcement of the State's lobbying laws as well as the ethics and financial disclosure laws for the Executive and Legislative Branches of government.

Under PIRA, JCOPE is required to "undertake a comprehensive review" of regulations and Advisory Opinions issued by its predecessor agencies, evaluate the effectiveness of the current regulations, and submit a report of its findings and recommendations to the Governor and Legislature by February 1, 2015. (Executive Law §94(1)). JCOPE's findings and recommendations that are discussed in this report are drawn from JCOPE's experience over the past three years, its analysis of the guidance and practices of its predecessors,

consultation with the Legislative Ethics Commission, the New York City Conflicts of Interest Board, and the New York City Office of the City Clerk, and suggestions and recommendations from the regulated community, civic groups, the media, and the public at large.

* * *

A. JCOPE's First Three Years

JCOPE was established in the wake of a number of ethics controversies involving elected officials and was charged with carrying out the reforms enacted in response by PIRA. These reforms included enhanced enforcement powers for JCOPE, more robust financial disclosure requirements for elected officials and tens of thousands of State officers and employees, and more comprehensive disclosure requirements for lobbyists and their clients.

JCOPE's mission, as articulated in PIRA and its legislative history, is to be a key player in efforts to restore the public's trust in State government. As both a leader and an active participant in those efforts, JCOPE aims to spur fundamental change with the community of elected officials, government officers and employees, law enforcement and regulatory counterparts, lobbyists, and non-governmental organizations.

In its three-year tenure, JCOPE has made important gains. JCOPE has issued new regulations and guidelines, revised certain existing regulations, brought a number of actions to enforce violations of the ethics (the Public Officers Law) and lobbying laws (Legislative Law Article 1-A, the "Lobbying Act"), developed new educational materials, and

implemented training programs for tens of thousands of State officers and employees and registered lobbyists. The agency's major undertakings include the following:

- Completed the first independent ethics investigation of a sitting legislator, leading to a $330,000 fine and his resignation from office.
- Adopted Source of Funding regulations (19 NYCRR Part 938) to implement the new requirement that entities lobbying the State disclose the sources of money they receive to fund their operations if their lobbying activity meets certain thresholds.
- Issued "Reportable Business Relationship" guidelines to implement the required disclosures by registered lobbyists and their clients of certain business relationships with State officers, employees, and elected officials.
- Adopted new regulations that govern the receipt of gifts by State officers, employees, and elected officials (19 NYCRR Part 933), as well as the offering of gifts by registered lobbyists and their clients to State employees and elected officials (19 NYCRR Part 934).
- Adopted new regulations prohibiting the appearance of high-level State officials in public service announcements for the 90-day period prior to an election in which they are a candidate (19 NYCRR Part 940).
- Revised existing regulations governing the receipt of honoraria by State officers and employees (19 NYCRR Part 930) and the payment of expenses related to travel for State officers and employees conducting official business (19 NYCRR Part 931).
- Proposed revisions to existing regulations governing outside activities of certain State officers and employees (19 NYCRR Part 932).
- Implemented substantial changes to the annual statement of financial disclosure ("FDS") imposing new disclosure obligations required by PIRA on State officers, employees, and elected officials.
- Introduced and carried out the first ethics training course for the thousands of registered lobbyists in the State.
- Developed a Comprehensive Ethics Training Course that has been provided to tens of thousands of State officers and employees, as well as an online ethics orientation for new State officials.
- Launched a new website and awareness campaign for the reporting of misconduct by State officials and employees.

In addition to this work, JCOPE devotes extensive efforts to regular duties. In the three years since its inception, JCOPE has:

- Commenced over 50 investigations, settled more than 60 matters, and conducted three public hearings, after reviewing hundreds of complaints, tips, and referrals. Settlements and civil assessments totaled more than $500,000.
- Supplied nearly 1,300 written responses to requests by State employees for guidance or approval of activities under the Public Officers Law.
- Processed more than 75,000 FDS filings of State officials and more than 100,000 disclosure filings by lobbyists and their clients.

B. Looking Forward: Recommendations and Initiatives

JCOPE's analysis of the current regulatory environment governing ethics and disclosure obligations for State employees, lobbyists, and clients of lobbyists began the moment the agency commenced its operations in December 2011 and continues to this day. As a newly-formed agency with a broader mandate and wider jurisdiction than its predecessors, JCOPE is obligated under PIRA to assess past interpretations of the Public Officers Law and the Lobbying Act, as well as the practices and procedures developed by prior agencies.

JCOPE's ongoing review has included: the scrutiny of procedures and precedent inherited from predecessor agencies; a revisiting of the new changes mandated by PIRA; and a reexamination of the regulations and guidance JCOPE itself has recently issued. This review also has encompassed nearly 450 Advisory Opinions issued by predecessor agencies, all existing regulations and guidance, and the statutes governing State officers, employees, and elected officials, and lobbying activities.

The review has already yielded meaningful results. The new regulations governing gifts to State employees (19 NYCRR Part 933) and gifts from lobbyists and their clients (19 NYCRR Part 934) are a direct product of JCOPE's analysis of the regulatory environment it inherited. These regulations replaced the guidance contained in Advisory Opinions issued by predecessor agencies. The revisions JCOPE made to existing honoraria and travel regulations, as well as the currently proposed modifications to the outside activity regulations, are also a result of this comprehensive review.

As part of its ongoing review of its operations and the regulatory environment for which it is responsible, JCOPE also has considered a number of potential modifications to the laws under its jurisdiction and identified areas requiring further attention and analysis. These proposals are intended to: increase transparency of JCOPE's actions; improve compliance with the ethics laws and regulations by State officers and employees, elected officials and lobbyists; enhance the accountability of public officials and those who seek to influence government decision-making; and build public confidence that JCOPE is fully equipped to meet its broad mandate.

Below is a summary of JCOPE's proposals, including specific legislative recommendations for consideration by the Governor and the Legislature, which are more fully discussed in the body of this report.

1. Increasing Transparency and Disclosure

- Amend the Executive Law to provide JCOPE with more flexibility to make information public by a vote of the commissioners, including the ability to make investigative findings public if no legal violation is found or if JCOPE determines not to investigate. In addition, consider whether JCOPE's current exemptions from the "Freedom of Information Law" and "Open Meetings Law" (Public Officers Law Arts.

6 and 7) should be modified to increase the transparency of JCOPE's operations while still protecting the integrity of JCOPE's sensitive compliance and investigative functions.

- Amend the Lobbying Act to require lobbyists to disclose political consulting and fundraising activity in their lobbying filings, as is required by the City of New York for lobbyists.

- Amend the Lobbying Act to expressly prohibit lobbying entities and coalitions from creating or participating in shell or pass-through entities in order to shield the identities of the sources from which they solicit or receive funding.

- Amend the Lobbying Act to require that all filings by lobbyists and clients be submitted electronically (absent a demonstrable hardship).

- Amend the Public Officers Law to require that all FDS filings be submitted electronically (absent a demonstrable hardship).

- Amend the Public Officers Law to expand FDS disclosures regarding clients who have business before the State. Currently, individuals are required to disclose only clients they represent before the State in connection with certain, specified matters. The expanded disclosure would have to be consistent with other ethical and legal obligations pertinent to the individual's profession, such as the New York State Rules of Professional Conduct for lawyers.

- Undertake a review of the Lobbying Act to ensure that the current filing disclosure requirements effectively capture the forms of government advocacy used today, including political and strategic consulting, third-party arrangements, and grassroots efforts, and issue new guidance, accordingly, to elicit sufficient specificity and consistency in reporting.

- Invest in JCOPE's information technology. A new FDS filing system is in development and will be introduced in mid-2015. Plans are also underway to redesign JCOPE's website in 2015. Finally, JCOPE intends to revamp its lobbying filing system with the goal of delivering a new system in 2016.

2. Strengthening Enforcement

- Amend the Executive Law to give JCOPE full jurisdiction over all matters involving State public officials and employees, including those in the Legislative and Executive Branches of government up to and including conducting hearings and making findings of fact and conclusions of law. The Legislature would retain authority over determining an appropriate penalty for its members and staff. (Currently, if an investigative matter involving an employee or member of the Legislature proceeds

to a hearing, the hearing is conducted by the Legislative Ethics Commission and not JCOPE).

- Amend the Public Officers Law to provide for financial penalties for violations of sections of the State's Code of Ethics (Public Officers Law §74) that currently contain no such penalties.

- Amend the Public Officers Law and the Lobbying Act to prohibit the solicitation, request, aid, or importuning of another to engage in conduct that violates those laws. (Currently, the Public Officers Law and Lobbying Law do not expressly provide for accessorial liability).

- Amend the Lobbying Act to provide financial penalties for a failure to cooperate with a JCOPE audit and for failure to take required ethics training.

- Amend the Lobbying Act to expand the conditions upon which JCOPE can bar an individual or entity from acting as a registered lobbyist to include repeated violations of the Lobbying Act, failure to pay civil fines or penalties imposed by JCOPE, and refusal to cooperate with an audit.

- Amend the Lobbying Act to provide for administrative penalties for violations of restrictions on contingency fee provisions in retainer agreements and to clarify that the registration requirements, restrictions, and penalties include third-party arrangements in which the client hires a third party who, in turn, hires the lobbyist to prevent "cut-out" arrangements.

- Amend the Lobbying Act to eliminate the provision that allows certain lobbyists and clients to avoid financial penalties if they file outstanding disclosure forms after an enforcement hearing.

- Amend the Lobbying Act to mandate that lobbyists and clients maintain records of both lobbying compensation and expenses (as opposed to merely expenses), and to authorize JCOPE to impose a penalty for any failure to do so.

- Amend the investigative procedures in the Executive Law to modify the 45-day time period in which commissioners must consider an investigative matter to clarify that JCOPE's commissioners are authorized to vote on any action (including adjournment) they deem appropriate within the allowed time period, or as soon thereafter as practicable.

3. Enhancing Effectiveness and Efficiency

- Reevaluate the FDS form, the effectiveness of current disclosure requirements to elicit meaningful information, and the applicability of the filing requirement to those

individuals who are statutorily mandated to file solely on account of their income and not because they hold so-called "policy-making positions" in State government.

- Continue to assess the post-employment restrictions contained in Public Officers Law §73(8) to determine whether modifications should be considered. This process, which has been ongoing, includes a survey of similar prohibitions in other states as well as the restrictions imposed by the Federal government and New York City.

- Study whether changes should be made to the Public Officers Law to help facilitate joint ventures and the commercialization of intellectual property developed at State academic and research facilities.

It should be noted that certain issues are not addressed in this report. JCOPE is well aware that questions have been raised over several aspects of its structure and statutorily mandated procedures and practices. Among the statutory areas that have generated public discussion are the special voting requirements to initiate a full investigation of certain public officials, the total number of commissioners serving on JCOPE, and the independence of commissioners from their appointing authorities. These, and other questions concerning JCOPE as an institution that implicate separation of powers, are the prerogative of the Executive and Legislative Branches of government, and are not within the purview of JCOPE. Finally, this report does not address reforms to the Election Law, as they fall outside of JCOPE's jurisdiction.

II. INTRODUCTION

The Public Integrity Reform Act of 2011 ("PIRA") reformed the oversight and regulation of ethics and lobbying in New York State and established JCOPE as the State's first independent ethics agency. JCOPE replaced the Commission on Public Integrity, but JCOPE's jurisdiction and oversight responsibilities are broader than its predecessor. Similar to the Commission on Public Integrity, JCOPE's purpose is to provide information, education, and advice regarding the State's ethics laws (Public Officers Law §§73, 73-a, and 74), the "Little Hatch Act" (Civil Service Law §107), and the Lobbying Act (Legislative Law Article 1-A), and promote compliance with these laws through audits, investigations, and enforcement proceedings. Additionally, PIRA gave JCOPE oversight and jurisdiction over State legislators, their employees, and candidates for the State Legislature, as well as the four Statewide elected officials, candidates for those offices, Executive Branch employees, certain political party chairs, lobbyists, and their clients. PIRA also substantially expanded the disclosure and reporting requirements for those within JCOPE's jurisdiction.

JCOPE was formally constituted in December of 2011, with the appointment of its commissioners. In terms of its structure, JCOPE has fourteen commissioners, appointed as follows: three appointed by the Temporary President of the Senate; three appointed by the Speaker of the Assembly; one appointed by the Minority Leader of the Senate; one appointed by the Minority Leader of the Assembly; and six appointed by the Governor and the Lieutenant Governor. The chairperson of JCOPE is selected by the Governor. Other than the initial appointments of commissioners, which had staggered terms,

commissioners serve for five years. JCOPE is required under the statute to meet at least bi-monthly. However, due to the workload, JCOPE routinely meets on a monthly basis.

The executive director of JCOPE is appointed by a vote of the commissioners and leads the day-to-day operations of the agency. JCOPE currently has approximately 40 employees, including attorneys, investigators, auditors, filing specialists, and administrative staff. JCOPE's appropriation has gradually increased over its three years. For State Fiscal Year 2014-15, JCOPE's appropriation was approximately $4.5 million. Both the staff levels and operations budget for JCOPE have been lower than those of predecessor agencies. Despite this, and despite the expansion of its mandate and jurisdiction, JCOPE, in its first three years, has continued to perform critical functions, taken on new initiatives, and implemented substantive reforms.

JCOPE commissioners and staff have regularly consulted counterpart governmental agencies, various civic groups, and members of the regulated community regarding improvements that could – and should – be made to JCOPE's statutory mandate. Although PIRA provided significant reforms, the past three years have demonstrated the need for additional changes to the State's ethics and lobbying laws to allow JCOPE to better fulfill its mission.

This report presents (i) measures introduced by JCOPE to implement PIRA's reforms; (ii) changes implemented by JCOPE as a result of its ongoing analysis of the effectiveness of the laws under its jurisdiction; and (iii) legislative recommendations and other initiatives for increasing transparency, enhancing enforcement of ethics and lobbying laws, and fixing technical inconsistencies that JCOPE believes should be considered.

III. ETHICS

With respect to State ethics requirements, JCOPE's core function is to provide guidance and training to facilitate compliance with the ethics laws. On a daily basis, JCOPE provides written and verbal guidance to agency ethics officers, current and former State employees, lobbyists, and clients of lobbyists. JCOPE has provided more than 1,100 written, informal opinions on the application of the Public Officers Law and the Lobbying Act. At its inception, JCOPE was faced with a backlog of requests for written guidance accumulated during the period when its predecessor agency was winding down and JCOPE was establishing itself. This backlog has been eliminated, and the typical time for a written response to a request for advice or guidance is 5-7 days.

In addition to these activities, JCOPE has focused on improving the information available to State officers and employees, with an emphasis on providing clear guidance and a reasonable application of the law. As part of these efforts, JCOPE regularly engaged in discussions with the Legislative Ethics Commission, which provides guidance on the State's ethics laws for the Legislative Branch. In this regard, JCOPE analyzed the new provisions of the law and the existing ethics regulations. JCOPE also has undertaken a comprehensive review and analysis – together with a systematic cataloging and indexing – of the more than 400 formal opinions issued by predecessor agencies. As a result of this analysis and review, JCOPE issued three new ethics regulations and revised and amended two existing regulations.

Finally, JCOPE has developed an extensive training and outreach program that consists of formal training sessions for agency ethics officers and State officers and employees,

informal roundtable discussions with agency ethics officers, a newsletter, pamphlets that provide an overview of key areas of the Public Officers Law, and periodic one-page publications highlighting various obligations for individuals covered by the Public Officers Law.

JCOPE's efforts are described in more detail below.

A. Regulatory Work

1. Gift Regulations (Parts 933 and 934)

The analysis of the laws governing receipt of gifts by State officers and employees or the offer of gifts by lobbyists and clients of lobbyists, which is covered under both the Public Officers Law and the Lobbying Act, has historically been complicated. There were different rules embodied in the applicable laws and different interpretations of those rules among the different oversight authorities. JCOPE's predecessors did not promulgate regulations governing gift restrictions. Rather, the rules governing gifts for State officers and employees were embodied in a series of Advisory Opinions.

PIRA amended some of the statutory exclusions to the definition of a "gift," which were codified in the Lobbying Act. In light of these changes, and prompted by a review of existing Advisory Opinions issued by its predecessors and the need to formulate written rules, in 2014, JCOPE, for the first time, promulgated gift regulations. Part 933 covers gifts offered to or accepted by State officers and employees, while Part 934 covers gifts from lobbyists registered with JCOPE and their clients.

The regulations were developed after an extensive public outreach. Prior to submitting the regulations for formal public comment under the State Administrative Procedure Act ("SAPA"), JCOPE solicited input from ethics officers, lobbyists, and other interested parties. It also consulted the Legislative Ethics Commission. The regulations provide clarity by creating a comprehensive framework for determining when a gift may be offered to, or accepted by, a State officer or employee.

2. Public Service Announcement Regulations (Part 940)

PIRA authorized JCOPE to adopt regulations that both promote and define the permissible use of public service announcements. These new regulations, which became effective in July 2014, were designed to address questions that had arisen over the years about public officials appearing in announcements sponsored by entities who have business before them. The regulations were developed after consultation with interested entities, including the Legislative Ethics Commission, as well as consideration of the public comments received in the SAPA process. The new regulations provide clarity in an area that had previously been unresolved by addressing the intersection of the Public Officers Law and public service announcements. The regulations prohibit high-level State officials who are running for office from appearing in public service announcements during the 90-day period prior to the election.

3. Honoraria (Part 930) and Official Activity Expense Payments (Part 931)

JCOPE also amended existing regulations governing the reimbursement and payment of expenses for official travel, as well as the regulations governing the receipt of honoraria by State officers and employees. These amendments bring the regulations in line with the

conceptual framework in the new gift regulations, thereby providing a more coherent regulatory framework that spans across multiple types of scenarios that State officers and employees may encounter.

B. Education and Outreach

Education and outreach have been, and will continue to be, a top priority for JCOPE. To this end, JCOPE has engaged in a variety of projects to increase awareness and understanding of the Public Officers Law and the Lobbying Act.

PIRA established a program for ethics trainings for individuals who are required to file a FDS. Additionally, the statute required, for the first time, that registered lobbyists complete an ethics training course.

In fulfillment of this mandate, JCOPE developed a Comprehensive Ethics Training Course ("CETC") for State officers and employees covering the obligations, responsibilities, and restrictions contained in Public Officers Law §§73, 73-a, 74 and Civil Service Law §107. In 2013, the CETC was delivered in a "train the trainer" format, where JCOPE conducts the course for ethics officers and other persons who, in turn, would provide the training to the officers and employees at their respective agencies. As a result of these efforts, in 2013, more than 24,000 State employees took the CETC. In 2014, JCOPE conducted regular CETC sessions for State officers and employees (as opposed to the "train the trainer" sessions, which were directed to ethics officers). The Legislative Ethics Commission has provided a similar ethics training program to legislative filers as required by PIRA. As a result of the

efforts of JCOPE, ethics officers at other agencies across the State, and the Legislative Ethics Commission, most FDS filers have now received ethics training.

In accordance with PIRA, JCOPE also developed an online Ethics Orientation for new State officers and employees. This newly-created course is offered through the State's new Statewide Learning Management System ("SLMS"), which provides a shared platform for agencies so that training programs are easily accessible. Since its implementation in mid-2014, nearly 1,000 new State officers and employees required to file FDSs have completed the orientation via SLMS.

Finally, with respect to the training mandated under PIRA, JCOPE developed an online ethics training course for registered lobbyists. The course went live in late September 2014, again utilizing the SLMS platform. In the nearly five months since the training has been available, more than 3,000 registered lobbyists have completed the training (nearly 50% of all registered lobbyists). JCOPE expects this number to increase over time.

In addition to complying with the requirements of PIRA, JCOPE has undertaken a number of initiatives, all of which are aimed at increasing knowledge and understanding of the Public Officers Law. JCOPE has initiated "The Ethics Review," a quarterly newsletter, the first edition of which was published in October 2014. Additionally, JCOPE publishes periodic Ethics Reminders – single-page documents on a discrete issue or requirement under the Public Officers Law. JCOPE has also created more in-depth publications that discuss, in greater detail, the post-employment restrictions applicable to former State employees as well as a guide to the new gift regulations.

C. Improving the Legal and Regulatory Framework

Based on its comprehensive review of the ethics laws and regulations, as well as its experience over the past three years, JCOPE has identified areas in which it will focus resources by either implementing changes it is able to make under existing law or providing analyses and recommendations for the Governor and the Legislature with respect to changes in the Public Officers Law. A brief explanation of these initiatives follows:

- Revisions to the Existing Outside Activity Regulations. Current regulations govern outside employment and other activities (such as Board service) for employees of the Executive Branch who hold "policy-making positions." These regulations (19 NYCRR Part 932), referred to as "Outside Activity Regulations," prohibit certain types of political activity and require that certain other outside undertakings be approved by both the employee's agency and JCOPE. The regulations are decades old and have not been subject to review for quite some time. Certain provisions of the regulations have also been the source of frequent questions from State employees.

  JCOPE has, therefore, proposed draft amendments to the Outside Activity Regulations. The amendments, which are posted on JCOPE's website for informal public review, clarify the existing regulatory framework. The amendments also provide for increased oversight by State agencies with respect to the outside activities of their employees to ensure proper protocols are in place to avoid potential conflicts of interest. By way of example, one proposed change in the regulations would require employees who have been designated as policy makers to inform their agencies when they hold a position on the board of a not-for-profit organization, even if they receive no compensation for such service. Currently, no such notice is mandated. Consequently, agencies may not have the information necessary to even evaluate if not-for-profit board service presents a conflict, or the appearance of a conflict, with an individual's State responsibilities.

- Post-Employment Restrictions. The post-employment restrictions, known as the "two-year bar" and the "lifetime bar,"[1] have a wide ranging impact on hundreds of

[1] The two-year bar is found in Public Officers Law §73(8)(a)(i). In general, the bar prohibits a former State employee from appearing or practicing before his former agency, regardless of compensation received, for a period of two years after leaving State service. The two-year bar also prohibits a former employee from being paid to render services in relation to a matter that is before his former agency even if he does not make an appearance before the agency. In other words, the statute forbids a former State employee from performing so-called "backroom services," *i.e.*, working behind the scenes on a matter that is before his former agency.

thousands of individuals in the State and are the subject of the overwhelming majority of requests for guidance submitted to JCOPE. Over nearly three decades, JCOPE's predecessors grappled with the governing laws in an attempt to strike the proper balance between enforcing its anti-revolving door provisions and ensuring that the State's ethics laws are not an impediment to attracting qualified individuals to State service.

The result is scores of Advisory Opinions addressing the application of the post-employment restrictions in very specific, yet wide-ranging circumstances. At the very least, this hodgepodge of precedent is difficult to navigate, especially for non-lawyers who seek to comply with the law.

JCOPE intends to conduct an in-depth analysis of the post-employment restrictions, contained in Public Officers Law §73(8)(a) and relevant Advisory Opinions, with the goal of making legislative recommendations. In conducting its analysis, JCOPE will review the effectiveness of the current application of the law which is a product of these past Advisory Opinions. Additionally, JCOPE will evaluate the various post-employment restrictions used by other states, New York City, and the federal government.

- Joint Ventures. The creation of joint ventures and other business enterprises utilizing research and intellectual property that is developed by State employees at State entities, including institutions of higher learning and research foundations, among others, has become an important part of the State's economic development. The Public Officers Law was drafted before these types of ventures became prevalent at institutions like the State University of New York and the Department of Health. State ethics laws certainly have a place in these types of undertakings. The Public Officers Law, however, should not impede these important relationships which are being fostered by state governments throughout the country.

  JCOPE will continue to assess whether the Public Officers Law presents hurdles for these types of joint ventures that have become an important part of the State's economic development and whether changes to the law should be considered.

- JCOPE's New Website. As part of its effort to make information more readily available, JCOPE plans to redesign its website in 2015. In response to suggestions from the regulated community and the public, JCOPE intends to streamline its website to make it more accessible and user-friendly.

  A key feature of the new website will be search functionality. Among other improvements, JCOPE is developing a new system to catalogue its more than 400

The lifetime bar is contained in Public Officers Law §73(8)(a)(ii). This prohibition commences when an individual leaves State service and remains in place for the lifetime of that person. In general, the prohibition bars a former State employee from appearing, practicing or performing services in relation to any matter in which the former employee was directly concerned or had personally participated while a State employee.

prior Advisory Opinions. The new system will include a summary of each opinion as well as subject-matter categories. This information will ultimately be available, in a user-friendly format, on JCOPE's website. Thus, the public will have, for the first time, a fully searchable database of Advisory Opinions and the ability to research these decisions in a meaningful way.

IV. FINANCIAL DISCLOSURE

Section 73-a of the Public Officers Law requires Statewide elected officials, members of the Legislature, candidates for elected State positions, political party chairs, and certain State officers and employees and employees of the Legislature to disclose information about their financial interests in FDSs that are filed with JCOPE annually. FDS forms serve three critical purposes: (i) providing to the public significant information about the outside interests of public officials; (ii) requiring public officials to consider their potential conflicts of interests on an annual basis; and (iii) serving as an important tool for regulatory and law enforcement agencies in investigating possible official misconduct.

JCOPE provides assistance and guidance to filers and works closely with other agencies to achieve compliance with this statutory mandate. The Public Officers Law allows individuals to apply for an exemption from the FDS filing requirements. JCOPE, therefore, also determines these requests.

Below is a discussion of JCOPE's administration of the FDS filings as well as an overview of the reforms JCOPE is recommending. The proposed reforms are a result of the ongoing comprehensive review of the laws and regulatory structures as well as experience with the FDS system over the last three years.

A. Administration of the Annual FDS Filings

Each year, JCOPE works with executive agencies and the Legislative Ethics Commission to identify required filers, notify filers of their filing requirements, process filings, and ensure compliance. In addition to elected officials and political party chairs, the FDS filing requirement applies to State officers and employees and legislative employees who (i) receive compensation in excess of the statutory filing rate of a SG-24 ($90,821 in 2015) or (ii) hold a policy-making position as determined by their appointing authority. JCOPE receives nearly 27,000 FDSs annually. Of such filings, approximately 16,000 are submitted by individuals designated as holding policy-making positions. Filers who are required to file solely based on their salary may apply for an exemption from the requirement to file, and all filers may apply for exemptions from certain reporting requirements relating to their spouse or children. JCOPE processes approximately 900 exemption requests per year.

In addition, over the past three years, JCOPE has implemented changes to the FDS disclosure requirements. Under PIRA, filers are now required to provide much more detailed information in their FDSs. PIRA made these changes to provide more information to the public in an effort to promote transparency. As a result of such changes, JCOPE, in 2013, developed and introduced a new FDS form and instructions.

Among other changes made by PIRA is a requirement that filers with outside employment disclose the identity of certain clients (Question 8(b) on the FDS questionnaire). Generally, under this new disclosure, filers must disclose clients who paid the filer or his firm for

services in direct connection with securing state contracts, legislative action, and grants. The statute also provides several exemptions to this disclosure requirement.

PIRA also significantly changed the way in which personal investment holdings, outside income, liabilities, receivables, and other financial interests are disclosed. These holdings are reported by use of a range of values. PIRA amended the statute to make each range smaller, thereby providing more insight as to the actual value of the item being reported. For example, prior to PIRA, a retirement account valued at $800,000 would be reported as "Category F: $250,000+." As a result of the changes in PIRA, that same account would now be reported as "Category L: $750,000 - $1,000,000."

PIRA also eliminated the rule that categories of value are redacted from public view. Before PIRA, an FDS was available to the public on request, but the law required redaction of all details regarding income and investments. Now, the public is able to see this important information. Additionally, PIRA mandated that the FDSs of State elected officials be posted on JCOPE's website for easier public access.

Based upon the changes to the FDS requirements in PIRA, and as part of JCOPE's ongoing effort to provide better guidance, JCOPE updated the existing FDS filing instructions. JCOPE introduced the new instructions in 2013 in time for the 2012 filing. The update is the first substantial revision to the instructions since at least 2007. JCOPE added new explanations, removed obsolete guidance, and provided more clarity on the application of the filing rules.

As part of its FDS responsibilities, JCOPE also identifies delinquent filers and works with these individuals to ensure that they file the required FDSs as expeditiously as possible.

Among other things, PIRA authorized JCOPE to conduct random reviews of FDS filings. JCOPE contracts with an independent statistical consulting firm to identify the selection of filers for review. The selection process includes a full randomization of the filer pool, consistent with industry standards. JCOPE also adheres to a formalized protocol to ensure uniformity in the review process, which is set forth in the guidelines for the random review program available on JCOPE's website.

When appropriate and necessary, JCOPE initiates enforcement actions, which can carry financial penalties, against delinquent filers. As part of the transition from the Commission on Public Integrity to JCOPE, all investigations, enforcement, and compliance activities were temporarily tabled. When JCOPE commenced its operations, it inherited a sizable backlog of non-compliance matters involving FDS filers. Recently, JCOPE entered into the first round of settlement agreements to resolve older FDS filing violations. JCOPE hopes to eliminate the backlog by early 2015 and reach its goal of pursuing real-time enforcement in the very near future.

B. Increasing the Effectiveness of the FDS System

Based on its review of the FDS disclosure requirements and its experience administering the filings, JCOPE concluded that further initiatives and reform are necessary in a number of different areas.

- Elicit Meaningful Disclosure. Although there have been great strides in increasing the public's access to information about the outside financial interests of government officials, JCOPE believes the purpose, effectiveness, and applicability of the FDS forms should be reevaluated. In addition, JCOPE has observed that responses to questions in the FDS filings often lack the specificity required by the statute to provide the level of disclosure intended by the law.

JCOPE recommends that consideration be given to both the scope and nature of the financial disclosure currently required in the annual filings. Among other things, the law should be amended to expand the disclosure about private clients who have business before the State. Currently, individuals are required to disclose only clients they represent before the State in connection with certain, specified matters.

In addition, JCOPE intends to conduct an in-depth analysis of the other disclosures currently required by section 73-a of the Public Officers Law. Over the years, JCOPE, its predecessors, and the Legislative Ethics Commission, have fielded thousands of questions about the various disclosure requirements. JCOPE will evaluate whether the existing disclosure requirements adequately elicit relevant information or whether more reform is warranted. JCOPE also will devote more of its resources to examining the adequacy of the responses supplied in these forms to ensure the public has access to meaningful information about potential conflicts of interest.

- Applicability of FDS to Threshold Filers. Currently, persons who are not policy makers, but exceed the salary threshold, file more than 10,000 FDSs annually. Most of the approximately 400 annual requests from the public for copies of FDSs, however, are for policy makers.

  JCOPE intends to conduct an analysis of the applicability of the FDS filing requirement to non-policy makers to determine whether consideration should be given to changing the statute to provide a less burdensome, but effective means, for some of these individuals to file disclosures while still ensuring the public has sufficient information about any potential conflicts of interest.

- New FDS Filing System. JCOPE recognizes that its current FDS electronic filing system is inadequate to process the nearly 27,000 FDSs submitted annually.

  JCOPE is developing, in conjunction with the State Office of Information Technology Services, a custom online filing system. The new system, which JCOPE will introduce in 2015 (in time for academic filers), will enhance the user-filing experience and improve JCOPE's administration of the filings. Below are the key new features that are designed to generate efficiencies in the filing process:

  - A user-friendly filing process that facilitates filer compliance with technical and substantive requirements.
  - Real-time access to the system for agency officials to update filer lists.
  - New controls on filing entries, improving quality control of data entered and expanding JCOPE compliance reviews.
  - Automated correspondence to address late, missing, or deficient filings, and, if necessary, begin enforcement proceedings.

- Electronic Filing. Currently, any FDS filer may submit his form either in paper or electronically. The paper submission of an FDS presents a number of challenges. Paper filings are difficult for the public to read and cannot be easily utilized by JCOPE when sorting data to assist in the enforcement of the ethics and lobbying laws. Working with agencies and filers, JCOPE has generated an electronic filing rate of more than 90 percent. The remaining paper filers, while a small percentage of all filers, consume significant administrative effort and resources.

  JCOPE recommends that consideration be given to amending Public Officers Law §73-a to require *all* filers (absent a demonstrable hardship) to submit their FDSs electronically.

V. LOBBYING

JCOPE regulates lobbying activity in New York pursuant to its authority under the Lobbying Act. The Lobbying Act requires that registered lobbyists and their clients report information concerning lobbying activities and expenditures to JCOPE and that JCOPE make such information publicly available. Lobbyists are required to submit, for each client, biennial registration statements and bimonthly disclosure reports of lobbying activity. Clients submit a single report every six months detailing all lobbying activity performed on their behalf. These reports include disclosure of compensation and expenses paid in support of a lobbying effort, as well as details about the nature and substance of the lobbying itself. This disclosure provides the public with essential information concerning groups attempting to influence government decision makers; in recent years, lobbying entities reported spending more than $200 million annually in support of their advocacy efforts.

An overview of JCOPE's administration of the lobbying filings, including implementation of the new disclosure requirements under PIRA, is provided below. In addition, as in other

areas under its purview, JCOPE has engaged in a review of the applicable laws and processes and has identified issues that are ripe for reform or further study.

A. Administration of Lobbying Disclosure

JCOPE's oversight of lobbying in the State includes processing and review of more than 40,000 mandated filings that are submitted on an annual basis by the nearly 6,900 registered lobbyists and their 4,600 clients. JCOPE also provides a technical support help desk for its online filing system, answers phone and email queries on filing best practices, and carries out hundreds of statutorily required random audits of filings each year. In addition to administering filings, JCOPE has made it a priority to develop a dialogue with the regulated community and the public on lobbying matters and to improve its training and guidance on the Lobbying Act.

To that end, JCOPE has conducted hearings on new disclosure requirements imposed by PIRA, held periodic roundtable discussions with the regulated community on a variety of subjects, and issued new training and education materials. PIRA imposed two new – and substantial – reporting obligations on the lobbying community:

- The disclosure by certain lobbyists and lobbying clients of each single source of funding in excess of $5,000 that was used to fund lobbying activities; and
- The disclosure by lobbyists and clients of any "reportable business relationship" with public employees and officials, or entities with which they have an interest, as set forth in the Lobbying Act.

In June of 2012, JCOPE conducted a public hearing and solicited comments from the regulated community and public interest groups on these two new requirements. JCOPE subsequently received and reviewed additional public comments concerning the scope and

meaning of the disclosure sought. At the end of 2012, JCOPE approved regulations and guidelines on these two requirements based on the input it received. JCOPE also designed new forms, published guidance materials in various forms, and offered training programs on compliance with the new requirements.

In addition, as part of its daily operations, JCOPE processes filings, pursues compliance, conducts random audits under the Lobbying Act, and enforces the Lobbying Act through administrative proceedings when necessary. As discussed in the next section of the report, over the past three years, JCOPE has pursued more than thirty violations of the Lobbying Act, imposing approximately $120,000 in penalties through settlement agreements and civil assessments.

B. Improving Compliance and Enforcement

Based on its experience administering, auditing, and enforcing the lobbying filing requirements, JCOPE has identified issues that affect the extent of information that is disclosed under the Lobbying Act, JCOPE's ability to effectively enforce the law, and the ease of access to public information. Among other things, additional reforms may be necessary to achieve the transparency that PIRA sought to effectuate with the new disclosure requirements and to capture the full range of advocacy efforts utilized today. JCOPE further recommends that its authority be amended to enable it to exercise more discretion in pursuit of remedies, including assessing appropriate penalties, for a broader range of misconduct. This enhanced ability to enforce the law will help deter misconduct and help to achieve the compliance and public disclosure goals of the Lobbying Act.

Brief explanations of the recommended changes are below:

- Reinforcing Source of Funding Disclosure. Questions have been raised about efforts to evade disclosing sources of funding by, among other things, using "pass through" entities to receive contributions. JCOPE has jurisdiction to pursue enforcement actions against any lobbying client who deliberately evades the reporting requirements and submits false filings. JCOPE does not, however, have authority over the sources themselves. Thus, individuals or entities are able, at this point, to construct funding mechanisms that may avoid disclosure while still technically complying with the law and the regulations. Additionally, the process by which certain clients seek an exemption from the source of funding disclosure requirements has attracted significant public attention.

  In response to these issues, JCOPE has amended the regulations to, among other things: (i) require more disclosure about sources of funding that are controlled by or closely related to a lobbying client; and (ii) change the exemption application process to increase transparency and streamline appeals. JCOPE recommends that further consideration be given to amending the law to directly address efforts to evade disclosure by using "pass through" entities.

- Disclosure of Political Activities. JCOPE shares jurisdiction with the New York City Office of the City Clerk over individuals and entities that lobby New York City officials and agencies. Although there are many similarities, New York City imposes some disclosure obligations that are not required under State law. Specifically, New York City requires that its lobbyists disclose their participation in political fundraising and consulting activities.[2]

  JCOPE believes there is value in directly connecting lobbyists and their campaign activities and recommends the adoption of a similar requirement at the State level.

- Addressing Current Forms of Advocacy. Based on changes in PIRA, issues raised through its dialogue with the community, and its own experience, JCOPE acknowledges the need to address the multiple forms of government advocacy taking place today. Among other things, questions have been raised about: the extent to which the Lobbying Act regulates grassroots lobbying efforts; whether third parties to lobbying contracts must be addressed directly in the law in order to ensure disclosure of information about the true lobbying client; and the meaning of "intended introduction of legislation" which PIRA added to the definition of "lobbying."[3]

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[2] *See* NYC Admin. Code Title 3, §3-216.1(a). Fundraising activities include the solicitation or collection of contributions for candidates for mayor, public advocate, comptroller, borough president, or member of the city council. The solicitation and collection of contributions for any public servant who is a candidate for any elective office are also covered fundraising activities.

[3] Lobbying Act §1-c(c)(i).

In 2015, JCOPE will provide guidance on a number of these complex and timely topics to ensure full compliance with the Lobbying Act, and when necessary, recommend additional legislative reforms for consideration. In addition, JCOPE will promote more accurate and complete filings by conducting a comprehensive review of its Lobbying Guidelines, which function as the filers' "handbook" for complying with the Lobbying Act.

- Lobbying Compensation Recordkeeping. The Lobbying Act requires that lobbyists and clients maintain records of lobbying expenses, and imposes penalties for failure to do so. (See Lobbying Act § 1-o(b)(vi)) The Lobbying Act, however, does not impose the same requirements for maintaining records of lobbying compensation.

  JCOPE recommends that the Lobbying Act be amended to mandate that lobbyists and clients maintain records of both lobbying compensation and expenses, and to authorize JCOPE to impose a penalty for any failure to do so.

- Failure to Comply with Audits. The Lobbying Act mandates that JCOPE conduct random audits of lobbying filings, and authorizes JCOPE to request documents from regulated entities to complete these audits. (See Lobbying Act § 1-d(b)) In order for JCOPE to fully realize this statutory goal, it should be able to assess penalties on those regulated entities that fail to comply with the audit process, produce documents on request, or provide any other requisite information.

  JCOPE recommends that the Lobbying Act be amended to authorize JCOPE to assess penalties against lobbyists and clients who fail to comply with the audit process.

- Online Ethics Training. PIRA created a new requirement that lobbyists take an online ethics training to ensure that those who regularly interact with government officials understand the applicable laws. As discussed above, JCOPE successfully introduced this training in 2014 using the SLMS portal. To date, nearly 3,000 lobbyists have taken the training. There is, however, no mechanism to enforce compliance with this mandate.

  JCOPE recommends that the Lobbying Act be amended to authorize it to assess financial penalties against those who fail to comply with the online ethics training requirements.

- Contingent-Retainer Agreements. The Lobbying Act prohibits a lobbyist or client from entering into a lobbying agreement in which compensation is contingent on the outcome of governmental actions.[4] JCOPE has identified two problems with enforcement of this provision. First, the prohibition on contingent retainers expressly applies to agreements between lobbyists and clients. Many lobbying arrangements, however, use an intermediary. In other words, a client may hire a third party and that third party enters into a lobbying agreement with a professional

[4] *See* Lobbying Act §1-k.

lobbyist. Second, while a violation of the contingent-retainer provision is punishable as a Class A misdemeanor, JCOPE lacks the authority to assess any civil penalties.

JCOPE recommends that the prohibition on contingent retainers be amended to expressly apply to any lobbying agreement covered under the Lobbying Act. JCOPE also recommends that the Lobbying Act be amended to authorize JCOPE to use administrative remedies to pursue violations of this provision, and impose civil penalties, in addition to or in lieu of referring violations to a prosecutor.

- Failure-to-File Cure for First-Time Offenders. JCOPE expends considerable resources in enforcing the Lobbying Act and pursuing administrative remedies, which include both an investigation and a public hearing before a randomly-assigned independent hearing officer. Nevertheless, under the Lobbying Act, a first-time offender is able to cure a failure-to-file violation without penalty, even after a hearing, by submitting the delinquent filing within 15 days of notice of a civil assessment.[5] In addition to JCOPE's wasted resources, such a result is counterproductive to the goals of promoting compliance and cooperation, particularly in light of the fact that JCOPE routinely reaches out to delinquent filers in an effort to obtain compliance without resorting to enforcement procedures.

  JCOPE recommends the repeal of the provision in the Lobbying Act that allows a first-time filer to cure a failure-to-file violation without penalty.

- Lobbying Bans. JCOPE recommends that further consideration be given to the current conditions under which entities may be banned from lobbying. Currently, a felony conviction can lead to a one-year ban from all lobbying activity.[6] In the lobbying context, multiple convictions for failure to file, false filing, or gift violations of the Lobbying Act may be prosecuted as Class E felonies. Multiple *civil* violations of the Lobbying Act, however, may result in a one-year ban from *procurement lobbying only*.

  JCOPE recommends that the penalty provisions of the Lobbying Act be amended to authorize JCOPE to assess a one-year ban from all lobbying (not just procurement lobbying) if an entity: (i) is found to have knowingly and willfully violated the Lobbying Act twice within any five-year period; or (ii) fails to timely pay civil assessments for violations of the Lobbying Act. Additionally, JCOPE recommends that the law be amended to authorize a five-year ban on all lobbying activity for an entity that violates a one-year lobbying ban, or is convicted of a lobbying felony or other corruption-related convictions under the Penal Law.

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[5] *See* Lobbying Act § 1-o(c)(iii).

[6] The 2014 Public Protection and General Government appropriations bill (Laws of 2014; Ch. 55) created a new permanent ban on lobbying for anyone convicted of any of the following felonies: bribery; corrupting the government (a newly-defined crime); or defrauding the government. The law also created a new five-year ban on lobbying for anyone who is convicted of any of the following misdemeanors: bribery; corrupting the government; official misconduct; or attempting to defraud the government.

- New Electronic Filing System. JCOPE processes approximately 40,000 filings annually, many of which are filed electronically through JCOPE's online lobbying filing system. The public accesses these filings by this same system. Unfortunately, however, the system is a vestige of multiple predecessor agencies, and has evolved into a limited, unwieldy, and ineffectual tool for filers, the public, and JCOPE. Among other problems, the system is slow during peak filing periods and suffers from frequent stability issues (resulting in lost data). In addition, the system lacks proper controls to ensure consistency of data which limits the ability to extract reliable metrics data.

  JCOPE intends to develop a new electronic filing system in conjunction with the State Office of Information Technology Services with the goal of delivering a new system in 2016. The improved system will provide increased bandwidth and capacity, easy-to-use electronic forms and filing processes, standardization and consistency in reporting data to generate better compliance and transparency, and automated compliance correspondence to generate on-time filing and facilitate any needed enforcement actions. In addition, a new application will enable users to run custom queries and reports with real-time data. These improvements will also allow JCOPE to run analyses of the data to spot trends in lobbying activity, identify compliance and enforcement issues, and recognize common reporting problems or questions that can then be addressed through targeted guidance and education.

- Electronic Filing. Although most lobbyists use the electronic filing system to submit registrations and reports, nearly half of clients do not file electronically. Among other things, administering paper filings drains resources and delays public access to information.

  In conjunction with the development of a new electronic filing system, JCOPE recommends that – absent a demonstrable hardship – all filers be required to submit lobbying reports to JCOPE via the electronic system. The elimination of paper filings will increase JCOPE's efficiency, improve compliance monitoring, and generate unprecedented transparency and access to information for the public.

VI. INVESTIGATIONS AND ENFORCEMENT

As mentioned above, in accordance with its authority under Executive Law §94, JCOPE investigates violations of the State's ethics laws (Public Officers Law §§73, 73-a, and 74), the "Little Hatch Act" (Civil Service Law §107), and the Lobbying Act. JCOPE's enforcement jurisdiction is broad and applies to the following individuals: State legislators and candidates for the Legislature; employees of the Legislature; the four Statewide elected

officials and candidates for those offices; Executive Branch employees; certain political party chairs; and lobbyists and their clients.

Since its inception, JCOPE has reviewed nearly 700 matters based on allegations received in tips and complaints, referrals from government agencies, or upon its own initiative. As of the end of 2014, JCOPE had entered into more than 60 settlement agreements, and conducted three public enforcement hearings before an independent hearing officer. In total, JCOPE's enforcement actions have resulted in $555,881 in penalties and restitution for the State.

As noted above, JCOPE is the first independent ethics agency in the State to have jurisdiction over the Legislative Branch. Utilizing this new authority, JCOPE conducted the first ever independent ethics investigation of a sitting New York State legislator – then-Assembly Member Vito Lopez. The comprehensive investigation into activities relating to charges of sexual harassment by Lopez resulted in a Substantial Basis Investigation Report. Under PIRA's statutory mandates, the report was referred to the Legislative Ethics Commission, which concurred with JCOPE's findings and conclusions and assessed a civil penalty against Lopez in the amount of $330,000. As a direct result of JCOPE's investigation, Lopez resigned from office on May 20, 2013.

The specific rules and procedures for conducting investigations and enforcement activities are mandated by Executive Law §94. Among other things, the law dictates notice to the subjects of investigations, voting requirements, and the confidential treatment and public release of information concerning JCOPE's proceedings. Many of these rules and procedures have been the subject of scrutiny and criticism by lawmakers, civic groups, and

the media. JCOPE acknowledges that the existing system could be improved. To this end, and as detailed below, JCOPE recommends that consideration be given to revisiting some aspects of the investigative procedures to allow for increased transparency and improved enforcement of the law.

A. Investigation and Enforcement Procedures

PIRA made substantial changes to the investigative process that was used by JCOPE's predecessor agencies. (Executive Law §94(13)). Among other things, PIRA: (i) established a time period for JCOPE's commissioners to act upon receipt of a complaint or allegations of violations of the law; (ii) required that staff present and seek authority from commissioners before proceeding with an investigation and issuing subpoenas; and (iii) established special voting requirements relating to investigations.

Investigations may be conducted on JCOPE's own initiative or based on referrals from other governmental entities or sworn complaints meeting certain criteria. In all cases, Executive Law §94(13)(a) dictates the process by which investigations proceed.[7] Before the commissioners can vote to commence an investigation, JCOPE must provide the person or entity subject to JCOPE's jurisdiction with a notice of any alleged violation of law and a 15-day period in which to respond to such allegations. This notice is commonly referred to as a "15-day Letter".

Section 94(13)(a) also requires that staff must present an investigative matter to JCOPE's commissioners for their consideration within 45 days of (i) receiving a sworn complaint or

[7] JCOPE has inherited matters from its predecessor agency. Some of these matters may, depending on their investigative stage at the time of JCOPE's creation, be subject to different procedures

referral that alleges facts sufficient to support a possible violation of law or (ii) sending a 15-day Letter. Under the law, staff must provide the commissioners with information regarding the scope of any investigation and a subpoena plan. JCOPE's commissioners must then vote on whether or not to commence a full investigation to determine whether a substantial basis exists to conclude that a violation of law has occurred. At least eight members must vote in favor of authorizing an investigation in order for JCOPE to proceed, and the statute includes specific voting requirements that are based on whether the individual is a Statewide elected official (or candidate for one of those offices), a direct appointee of a Statewide elected official, a member of the State Legislature (or a candidate), an employee of the State Legislature, or an employee of the Executive Branch.

The confidentiality of the above procedures, *i.e.*, the 15-day Letter, voting on whether to commence an investigation, and all applicable notices are provided for in the law. Specifically, section 94(13)(b) expressly provides that these actions and proceedings are confidential. Thus, while the recipients of any 15-day Letter or notice from JCOPE are free to divulge to the public the information they have received, JCOPE may not do so. In fact, under PIRA, unauthorized disclosure of confidential information is punishable as a class A misdemeanor.

At the conclusion of an investigation, the commissioners determine whether there is a substantial basis to conclude that a violation of law has occurred and to assess appropriate penalties, if any. These procedures are found in Executive Law §94(14). Here, too, the law mandates special voting requirements, which are based on the same categories as those used for votes to determine whether to commence an investigation.

If a matter receives the requisite votes from the commissioners, JCOPE issues a "Substantial Basis Investigation Report." This report is a publicly available document setting forth specific allegations of facts and violations of law. JCOPE may impose civil penalties, after a hearing, for violations by State officers and employees and lobbyists and clients. (Executive Law §94(14)). JCOPE's allegations with respect to Legislative Branch officers, employees, and candidates are required to be referred to the Legislative Ethics Commission for enforcement. (Executive Law §94(14-a)).

In its first year, JCOPE comprehensively reviewed the new statutory procedures, relevant regulations, and internal practices for review and processing investigations. In early 2012, JCOPE amended the existing regulations governing the conduct of adjudicatory proceedings relating to the assessment of civil penalties. (19 NYCRR Part 941). To ensure fairness of the proceedings, the regulations provide that independent hearing officers, selected randomly from a pool of hearing officers, will conduct adjudications. JCOPE also published procedures, available on JCOPE's website, for filing sworn complaints alleging violations of laws under its jurisdiction.

Over the past three years, JCOPE has established internal procedures for intake and review of all tips and complaints and worked closely with the State Office of Information Technology Services to create an effective electronic case management system. Another important initiative was the introduction and promotion of JCOPE's new hotline (1-800-ethics) and website (reportmisconduct.ny.gov), both of which are designed to make it easy for the public to report matters for possible investigation. Additionally, JCOPE has

introduced a periodic newsletter that is disseminated to all State agencies and available online. Among other things, this new publication highlights recent enforcement actions.

B. Review and Disposition of Investigative Matters

Over the past three years, JCOPE has processed almost 700 matters. In general, the allegations cover a broad range of violations under the Public Officers Law and the Lobbying Act, including subjects such as nepotism, post-employment restrictions, prohibited gifts, conflicts of interest, misuse of State resources, and failure to submit required disclosure filings to JCOPE. The vast majority of these matters have been resolved as of the date of this report.

JCOPE notes the importance of its working relationships with law enforcement agencies with respect to its investigative authority, particularly in light of the number of high profile matters involving public officials in recent years. Although JCOPE has tools to enforce the ethics laws and impose penalties, when conduct rises to criminality, in the first instance, it is within the province of law enforcement agencies charged with prosecuting crimes under State or Federal penal laws. Accordingly, since its inception, JCOPE has cooperated with several law enforcement agencies, including deferring investigative or enforcement actions so that the prosecutors may pursue potentially criminal matters.

As of the end of 2014, JCOPE had issued 121 15-day Letters and had commenced 56 investigations. Fifteen investigations involved the Public Officers Law and 41 involved the Lobbying Act. Nearly all of these investigations (95%) were commenced without any dissenting votes. Of the 56 investigations commenced, 33 resulted in settlement

agreements. The commissioners also had voted not to commence an investigation into 31 matters in which a 15-day Letter was sent. Again, in the vast majority of these matters (90%), there were no dissenting votes.

JCOPE has entered into a total of 62 settlement agreements[8] and conducted three public hearings. Of the matters that have been settled or were the subject of public hearings, 34 involved violations of the Public Officers Law and 31 involved violations of the Lobbying Act. These matters resulted in a total of $225,881[9] in penalties and restitution for the State. Additionally, as a result of JCOPE's investigation into Vito Lopez, the Legislative Ethics Commission issued a $330,000 fine against Lopez. As of the end of 2014, JCOPE had 10 open investigations and 67 matters pending review.

Through its enforcement activity, JCOPE has increased awareness of its presence, purpose, and value as an independent oversight agency. Among other things, JCOPE has developed relationships with law enforcement partners. It also has entered into ongoing dialogues with agencies, and has nurtured relationships with agency counsel, ethics officers, and other agency personnel. JCOPE will continue to collaborate with State agencies to efficiently resolve disciplinary matters that involve violations under JCOPE's jurisdiction.

C. Strengthening Enforcement of Ethics and Lobbying Laws

JCOPE has an ongoing responsibility to assess both the effectiveness of the laws it enforces, as well as its own procedures. This duty is an inherent part of JCOPE's core function of

[8] The number of settlement agreements exceeds the number of investigations because some persons choose to settle with JCOPE prior to the commencement of an investigation and some matters were inherited from JCOPE's predecessor agency.
[9] This figure includes $11,600 in civil assessments related to matters that were opened under a predecessor agency.

enforcing the ethics and lobbying laws. It is also a statutory mandate under PIRA. In the process of reviewing potential investigative matters, conducting investigations, negotiating settlements, and holding hearings, JCOPE has identified several specific areas in which both its procedures and the substantive laws that it enforces can be improved in order to increase transparency and accountability.

- Presentation of Investigative Matters to the Commissioners. The new requirement in Executive Law §94(13)(a) that a matter must be presented to JCOPE's commissioners for a vote within 45 days has been the subject of debate. The apparent purpose of this provision is to ensure that JCOPE's staff promptly presents matters to its commissioners. Nevertheless, what is implicit in the statute is the ability of JCOPE's commissioners to exercise their discretion and vote to adjourn a matter. Establishing a better understanding of the allegations by having staff engage in additional fact gathering, allowing a subject more time to respond to a 15-day Letter, or deferring to a request from law enforcement partners that share jurisdiction over a matter are among the scenarios where a decision to adjourn may be the most appropriate course of action. The fact that the inherent power of the commissioners to adjourn a matter is not explicitly provided for in the statute has produced confusion.[10] The 45-day requirement also appears to be inconsistent with other provisions of law. For example, the Lobbying Act requires that the commissioners meet only on a bi-monthly basis. Thus, it is entirely possible that JCOPE may not meet within 45 days of sending a 15-day Letter or of receipt of a sworn complaint.

  To avoid any further confusion, JCOPE recommends that Executive Law §94 be amended to clarify that the commissioners are authorized to vote on any action (including adjournment) they deem appropriate within the allowed time period, or as soon thereafter as is practicable.

- Complete Jurisdiction over Investigations. The current statutory process mandates that, after conducting an investigation and issuing a Substantial Basis Investigation Report involving the Legislative Branch, JCOPE must transfer the matter to the Legislative Ethics Commission for its consideration, subject to whatever rules and regulations the Legislative Ethics Commission has adopted. In all other instances, after issuing a Substantial Basis Investigation Report setting forth allegations of violations of law, JCOPE proceeds to hearing before an independent hearing officer who issues findings of facts and conclusions of law for the consideration of JCOPE's commissioners in assessing a penalty, if any. Given JCOPE's familiarity with the evidence and comparative resources, it would be more efficient and effective for

[10] In fact, the meaning of this provision is currently being litigated in New York State court.

JCOPE to proceed with a public hearing over matters involving the Legislative Branch.

JCOPE suggests that it should retain jurisdiction over a matter through the end of the public hearing that takes place before an independent hearing officer. Upon conclusion of the hearing, the independent hearing officer's report and recommendation would be presented to the Legislative Ethics Commission for its consideration. Similar to JCOPE's commissioners, the Legislative Ethics Commission would have the authority to adopt the findings of the hearing officer, or it may reverse, remand, and/or dismiss the hearing officer's findings based upon the record at the hearing. The Legislative Ethics Commission would also assess penalties as it deems appropriate. The proposed changes would streamline the adjudicatory process. The modifications also would increase the transparency of JCOPE's operations and further the goal of having an independent agency investigate and enforce possible violations of the law regardless of who is the subject of the investigation.

- More Transparency. Executive Law §94 limits JCOPE's ability to make all of its investigative findings public. Not only is it a potential crime to disclose confidential information, but JCOPE is exempt from the Freedom of Information Law and the Open Meetings Law (with some limited exceptions). These provisions ensuring confidentiality serve important public policies, including protecting the integrity of JCOPE's investigations and the reputations of the subjects of investigation unless and until there is basis to conclude they have violated the law. Nevertheless, JCOPE believes that, in some instances, the public interest would be better served if more information is released.

  For example, several high profile matters have been publicly presented to JCOPE. Under the statute, JCOPE could not even acknowledge that it was reviewing those matters. Indeed, the only public pronouncement JCOPE is authorized to make is the publication of a Substantial Basis Investigation Report, which can only occur when the commissioners conclude that there has been a violation of the law or has entered into a settlement agreement. In all other circumstances (including ones in which the commissioners conclude, after an investigation, that there has been no wrongdoing), JCOPE is statutorily forbidden from issuing public statements about the outcome of a matter. This is unfair to the public and to individuals who have been publicly accused of violations of law with respect to which JCOPE determines there is no basis to proceed.

  JCOPE recommends that Executive Law §94 be amended to grant the commissioners more flexibility to publicly release information about its activities, particularly with respect to investigative matters. Consideration should be given to the principles of the Freedom of Information Law and Open Meetings Law and whether more transparency is possible while still protecting the strong public policy interests in the confidentiality of certain of JCOPE's functions.

- Creating Express Accessorial Liability. The Public Officers Law and the Lobbying Act do not expressly authorize JCOPE to pursue individuals under JCOPE's jurisdiction who aid others in the commission of acts in violation of the law. The inclusion of so-called "accessorial liability" in the law would strengthen JCOPE's enforcement arm and promote compliance with the State's ethics and disclosure laws.

  JCOPE recommends that these laws be amended accordingly to expressly prohibit individuals and entities under JCOPE's jurisdiction from the solicitation, request, aid, or importuning of another to engage in conduct that violates the State's ethics and lobbying laws.

- Financial Penalties for all Violations. Section 74 of the Public Officers Law establishes a code of ethics for State officers and employees in both branches of government. The code of ethics is intended to guide public officials and to prevent both actual and apparent conflicts of interest. For example, section 74 prohibits, among other things, the disclosure of confidential information, obtaining outside employment that will impair independence of judgment, and using a public position to secure unwarranted privileges. Sections 74(3)(f) and (h) address broader and more general conduct.

  - Section 74(3)(f): "An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person."

  - Section 74(3)(h): "An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust."

  These two provisions often are integral to addressing improper conduct that does not fall into any of the other provisions in Section 74 dealing with more specific conduct. Notably, most of the provisions in Public Officers Law §74 carry significant financial penalties. Sections 74(3)(f) and (h) do not carry any financial penalties.

  JCOPE recommends that Public Officers Law §74 be amended to allow for the assessment of monetary penalties for violations of sections 74(3)(f) and (h). JCOPE believes that its ability to assess, in its discretion, monetary penalties for violations of these provisions will be of particular benefit in enforcing the Public Officers Law and in sending a message to the public that violations of the law have concrete consequences.

VII. CONCLUSION

JCOPE appreciates the opportunity to convey its recommendations to the Governor, the Legislature, and the public. Like many aspects of JCOPE's work, this report is a product of robust discussion among the commissioners who come from different backgrounds, have varying political views, and often have diverse public policy concerns. This report also reflects the healthy debate that is inherent to the important and difficult work of JCOPE. The fact that consensus is often reached on key matters after such healthy debate is a reflection of the commissioners' commitment to making JCOPE as effective as possible.

In the course of drafting this report, commissioners discussed aspects of JCOPE that include: the composition of the commission (including the number of commissioners, the selection of the chair and commissioners, and filling of vacancies); the process by which entities seek exemptions from the Source of Funding disclosure obligations, and the special voting requirements for investigations. Although these issues, which are central to JCOPE's operations, are worthy of debate, JCOPE has determined that such matters are ultimately the prerogative of the Governor and the Legislature.

Accordingly, JCOPE respectfully submits this report to the Governor and Legislature for consideration.

* * *

Respectfully submitted,

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Chair

David Arroyo
Paul Casteleiro
Hon. Joseph Covello
Marvin E. Jacob
Seymour Knox, IV
Gary J. Lavine
Hon. Mary Lou Rath
David A. Renzi
Michael A. Romeo, Sr.
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Hope For JCOPE

Report of the
New York City Bar Association
and
Common Cause/New York

MARCH 14, 2014

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I. INTRODUCTION

The Joint Commission on Public Ethics ("JCOPE" or "Commission"), created by Chapter 399 of the Laws of 2011, is the body that administers and interprets the laws governing the ethics of New York public officials in both the Legislative and Executive Branches. It has the responsibility for initiating and conducting ethics investigations and decides whether a substantial basis exists to conclude that the ethics laws have been violated. It may impose sanctions, except in the case of a member or employee of the Legislature, where sanctions are imposed by the Legislative Ethics Commission ("LEC").[1] An appointing authority may also impose disciplinary sanctions for violations found by the Commission. The Commission also enforces the State's lobbying laws and is charged with administering public disclosure of both ethics and lobbying filings, including those designed to disclose conflict of interest risks and the nature and extent of special interest advocacy directed at public officials. It carries out ethics and lobbyist training and annually reports on, among other things, changes it believes are needed in the laws related to the conduct of persons within its jurisdiction, such as public officials and lobbyists.

It is in the interest of the State of New York that JCOPE be strong and effective. First, ethics laws are the first line of defense against actual corruption, such as paying a benefit in exchange for the action or inaction of a public official, whether that action is the vote of a member of the Legislature or an action by a state agency controlled or influenced by a member of the Executive Branch. It is the first line of defense because the rigorous enforcement of rules related to conflict of interest and breach of the public trust deters conduct that constitutes even the appearance of unethical or criminal behavior. Appearance is the common ethical standard and is, for example, the standard of ethical rules that govern the conduct of attorneys. Second,

[1] The LEC may also consider whether it agrees with JCOPE's determinations on questions of law.

ethics rules regulate activities which create conflicts of interests that may bias the judgment of the public officer against the interests of the State and its people, and his or her constituents in the case of elected officials, in favor of special interests and others whose private objectives may be in conflict with the public good. Third, and most importantly, because ethics rules are based on both the fact and appearance of impropriety, they serve to require a mode of official behavior that reduces cynicism and encourages the people's trust in government and their willing participation in the political process.

This assessment of the Commission after two years of its operation is being conducted jointly by the New York City Bar Association through its Committee on Government Ethics and Common Cause/New York (the "Review Group"). In the coming months there will be other reviews. The law establishing JCOPE requires, in § 21, that by no later than June 1, 2014 the Legislative Leaders and the Governor appoint eight people to review JCOPE's work and report by March 1, 2015.[2] That report must include "any administrative and legislative recommendations on strengthening the administration and enforcement of the ethics laws in New York State." In addition, JCOPE and the LEC must, by February 1, 2015, conduct and report on their own internal review of "the effectiveness of existing laws, regulations, guidance and ethics enforcement structure to address the ethics of covered public officials and related parties." That report must include any advisory opinions or guidance necessitated by that review and propose any necessary statutory changes.[3]

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[2] "No later than June 1, 2014, the governor and the legislative leaders shall jointly appoint a review commission to review and evaluate the activities and performance of the joint commission on public ethics and the legislative ethics commission in implementing the provisions of this act. On or before March 1, 2015, the review commission shall report to the governor and the legislature on its review and evaluation which report shall include any administrative and legislative recommendations on strengthening the administration and enforcement of the ethics law in New York state. The review commission shall be comprised of eight members and the governor and the legislative leaders shall jointly designate a chair from among the members." N.Y. Laws 399 § 21 (2011)

[3] N.Y. Laws 399 § 94(1) (2011)

This Review Group believes that it is not too early to assess the effectiveness of JCOPE and its scope of authority, and to make recommendations for improvements that can be implemented now, often at little or no cost. In the past two years New York State's reputation has continued to be severely damaged by a series of criminal convictions and proven acts of breach of trust by elected officials. As this report was being finished, the latest in a string of State Legislators charged with criminal misconduct has just been convicted. We believe that JCOPE has the statutory authority to take the initiative and act now on recommendations that will go far to meet JCOPE's burden to demonstrate to the public its energy and commitment and thereby advance JCOPE's mission to secure public trust in government. The public need not wait until late 2015, or more likely 2016, for JCOPE to make these needed changes. Other steps to shore up the independence of JCOPE in fact and appearance will require legislation. Again there is no reason to wait.

This Report focuses on six areas: Enforcement, Regulation of Lobbying Activities, JCOPE's Website, Standards Relating to Self-Dealing, Ethics Training, and the Composition of the Commission. The "Hope for JCOPE" referred to in the title of this Report is that it act with the real vigor needed in the circumstances the State faces to help restore public confidence in government and arrest the decline in the public's participation in the political process. As explained more fully below, we believe that in overall terms JCOPE's first two years have been unsuccessful in meeting this mission because the agency has not acted with that full vigor. As noted above, JCOPE has the burden of proof to persuade the public of its independence, vigor and commitment, and in its first two years it has not in our judgment carried that burden. In many respects, JCOPE appears reactive rather than proactive. Much of its activity entails processing assigned work flow. We find that in areas such as the promulgation of regulations

and responding to requests for formal or informal advice it appears to have performed well. However, our view is that JCOPE is an agency that must be proactive and aggressive in the cause of ethical government by following investigations wherever they may lead and by making full use of its statutory powers. Our recommendations set forth what can and should be done in this regard.

Below in bullet point form are our recommendations. Those that can be implemented without the need for legislation are in bold.

- Enforcement
    - Eliminate the Political Party Component of the Special Vote Requirement for Enforcement Decisions
    - **Require Disclosure of Special Votes That Veto Enforcement Against the Vote of a Commission Majority**
    - **Delegate to the Executive Director the Ability to Issue Person of Interest or Target Letters in Ongoing Investigations**
    - **To Assure Appearance of Independence, Erect a Firewall between JCOPE Commissioners and the Public Officials Who Appointed Them**
    - **Issue Guidance Regarding Sanctions for Violating Public Officers Law § 74(3)(f) (appearance of undue influence) and § 74(3)(h) (breach of trust) of the Code of Ethics**
    - **Issue Guidance Regarding the Ethical Duty to Report Criminal or Fraudulent Behavior of Public Officers**
- JCOPE's Regulation of Lobbying Activities
    - **Require More Particularized and Uniform Disclosure**
    - **Promulgate a Lobbyist Code of Ethics**
- JCOPE's Website
    - Work to Expand Project Sunlight Beyond Procurement and Regulatory Issues in the Executive Branch to Include Law Making and the Legislative Branch

- **Together with the Attorney General and the Project Sunlight Office, Convene a Roundtable for Database Users And Work to Meet their Needs**

- Self-Dealing

  - **Issue Guidance that Bans Legislators, their Staffs and their Immediate Families from Holding Office, Recommending Employment, or Engaging in Certain Business Dealings with State-Funded Not-for-Profit Organizations**

- Ethics Training

  - **Prepare a Comprehensive and User Friendly Ethics Handbook**

  - **Provide Guidance on the Ethical Rules Applicable to Dealings With Large Campaign Contributors**

  - **Specify in that Guidance a Standard that Prohibits the Appearance of Unethical Conduct in Selling Special Access to Large Contributors or Their Lobbyists**

  - **Work to Use Guidance and Advocacy to Build a Better and More Ethical Culture for the State Of New York**

  - **Use Video Messages from Top State Leadership to Promote an Ethical Culture**

- Composition of the Commission

  - Eliminate the Express Political Test for Gubernatorial Appointments

  - Reduce Gubernatorial Appointments to Four

  - Reduce Legislative Leader Appointments to a Total of Six

  - Add Appointments by the Chief Judge, the Attorney General and the Comptroller

  - Make the Size of the Commission an Odd Number, Namely Thirteen

We wish to extend our gratitude to JCOPE for their full and most helpful cooperation with our work. We do not doubt that the Commissioners and their staff are all people of ability and goodwill desirous of doing their job well. We have met twice with the Commission Chair and Executive Director and on both occasions had helpful dialogue about what might be done.

We believe they are eager to do more. It is the Review Group's hope that our recommendations will be seen as constructive, and that our offer to help facilitate the implementation of these or comparable steps, including advocating the budgetary funding needed to carry out the recommendations below that require additional funding. The creation of JCOPE was appropriately heralded at the time as a breakthrough, and a new beginning of ethical government for our State. JCOPE remains a young agency. Its bumpy past need not be prologue. It is time to capitalize on the lessons of JCOPE's first two years, and help the agency realize its original promise. That is our Hope for JCOPE.

II. HISTORICAL BACKGROUND

A. Prior Efforts At Creating An Ethical Watchdog For New York

The Public Integrity Reform Act of 2011 ("PIRA"),[4] which created JCOPE, was the product of Governor Andrew Cuomo's campaign promise to address unethical conduct in state government. During his first six months in office, Governor Cuomo made passage of the legislation a top priority, using the influence and weight of his office across the State to convince the legislature to enact his proposed reforms. PIRA was intended to be an improvement upon past ethics reforms, which had not prevented a string of scandals involving officials and legislators.

The modification to lobbying and ethics laws in New York State began with the Public Employee Ethics Reform Act of 2007 ("PEERA"),[5] which was the first comprehensive ethics legislation passed by the Legislature in more than 20 years.[6] PEERA merged the State Ethics Commission and the Temporary Commission on Lobbying to create a combined commission

[4] 2011 N.Y. Laws 399. PIRA was signed into law by Governor Cuomo on August 15, 2011.
[5] 2007 N.Y. Laws 159. PEERA was signed into law by Governor Spitzer on March 27, 2007.
[6] *See* Ethics in Government Act of 1987, 1987 N.Y. Laws 3022.

called the Commission on Public Integrity ("CPI").[7] The thirteen-member CPI had jurisdiction over statewide elected officials and candidates for statewide elected office; State officers and employees; political party chairs; lobbyists and clients of lobbyists—but not legislators or employees of the Legislature. The latter non-covered groups came under the jurisdiction of the separate LEC. The membership of the LEC, which formerly consisted solely of active legislators, was adjusted to include nine appointments from the legislative leadership, with four seats reserved for sitting legislators.

The CPI and LEC had similar roles within their respective jurisdictions. The CPI was empowered to provide advisory opinions, conduct investigations, and impose penalties for violations of the state's ethics laws.[8] The LEC, on the other hand, had the statutory power to promulgate regulations on limited matters, assist the Legislature in creating rules and regulations, including those concerning the conduct of covered individuals, and was responsible for educating employees of the legislative branch about the state's ethics laws.[9]

During its existence, allegations were made that the CPI was being used for political purposes by Governor Eliot Spitzer.[10] The "Troopergate" matter, in which the Executive Director of CPI inappropriately shared confidential CPI information with members of the Spitzer administration, undermined confidence in CPI, which was controlled by governor-appointed commissioners and affected by overlapping bureaucracies.[11] In addition, the LEC, which was

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7 2007 N.Y. Laws 159. PEERA was signed into law by Governor Spitzer on March 27, 2007.

8 *Id*.

9 *Id*.

10 *See, e.g.*, *Fed Up With Albany*, N.Y. TIMES, Oct. 19, 2009, at A26, *available at* http://www.nytimes.com/2009/10/19/opinion/19mon1.html.

11 State of New York Office of the Inspector General, *An Investigation of an Allegation That Herbert Teitelbaum, Executive Director of the Commission on Public Integrity, Inappropriately Disclosed Confidential Commission Information Related to Its Troopergate Investigation and An Investigation of the Appropriateness of the Commission on Public Integrity's Response Upon Receiving the Allegations Against Its Executive Director* 168-174 (May 13, 2009);

never fully staffed, did not initiate a single significant investigation of legislator misconduct until 2010.[12] During this same time, no fewer than nine legislators were indicted or convicted of bribery, fraud or other crimes committed while they were in office.[13]

B. The New York Bar's NYSBA and NYCBA Critiques of the CPI and LEC

In light of PEERA's history, numerous government watchdog groups,[14] the New York City Bar Association ("NYCBA") and the New York State Bar Association ("NYSBA") recommended the creation of a new ethics agency. The NYCBA argued that even after PEERA, New York State government remained "under intense scrutiny for its ethical shortcomings."[15] The NYSBA suggested that additional changes were needed to bolster "the ethics climate in New York State."[16] The NYCBA and NYSBA made recommendations for a new ethics agency. The recommendations included: (1) combining the CPI and the LEC into a single agency, (2) reducing the number of commissioners serving on the new agency, (3) protecting the ethics agency's independence and funding, and (4) resolving the conflict between the CPI and LEC's dual roles as ethical enforcer and advisor.

See also Fred Lebrun, *Many Questions Linger About State Ethics Panel*, ALBANY TIMES UNION, Oct. 17, 2011, *available at* http://www.timesunion.com/local/article/Many-questions-linger-about-state-ethics-panel-2220733.php.

[12] Lawrence Norden, et al., *Meaningful Ethics Reforms for the 'New' Albany*, Brennan Center for Justice at New York University Law School (Feb. 11, 2011) at 2, *available at* http://www.brennancenter.org/sites/default/files/legacy/Democracy/Meaningful_Ethics_Reform_New_Albany_Final.pdf.

[13] *Id*.

[14] *See*, *e.g.*, *id*. PEERA ignored "calls for an independent, bipartisan commission with jurisdiction over all public officials, including the executive and legislative branches and lobbyists" and "New York was left with the bifurcated and confusing system of ethics oversight that has largely stood by, mute, through a series of scandals on the legislative side."

[15] "Reforming New York State's Ethics Laws The Right Way," Report of the New York City Bar Association Committee on State Affairs and Committee on Government Ethics, Feb. 2010, at 1, *available at* http://www.nycbar.org/pdf/report/uploads/20071860-ReformingNYSEthicsLawstheRightWay.pdf. [hereinafter "NYCBA Report"]

[16] New York State Bar Association Task Force On Government Ethics, Jan. 28, 2011, at 5, *available at* http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26662. [hereinafter "NYSBA Report"]

Both bar associations recommended that the CPI and the LEC be combined into a single independent agency with responsibility for overseeing and enforcing ethics laws for the executive branch, the Legislature and lobbyists alike. The NYCBA noted that the "Legislative branch is not hermitically sealed from its coordinate branches" and argued that some overlap between the branches would not violate the separation of powers.[17] Further, the NYCBA commented that the Legislature could, through standing committees on ethics, continue to police its own membership,[18] and that the creation of a single ethics agency would follow the practice of a majority of states which have some type of unified ethics commission with jurisdiction over both legislative and executive branches.[19]

The NYSBA recommended that the number of commissioners on the new agency be reduced from thirteen to between seven and nine. The NYSBA cited as support for this recommendation the CPI's own admission that its large membership was "unwieldy."[20] Both bar associations recommended that each commissioner serve a five-year term,[21] "so that their terms will outlast those of the elected official who appointed them."[22]

To further preserve the independence of the ethics agency, the NYCBA called for the creation of a designating commission, similar to the system used to recommend potential nominees to the Court of Appeals, to appoint members to the ethics agency.[23] It recommended that the pool from which appointments can be made also be limited to persons who are not current state officials or lobbyists.[24] The NYSBA recommended that appointments to the agency come from a number of sources: the Chair being appointed by the Governor and confirmed by

[17] NYCBA Report at 35.
[18] *Id*. at 44-45.
[19] NYSBA Report at 36.
[20] *Id*.
[21] *Id*. at 5
[22] NYCBA Report at 42.
[23] NYCBA Report at 37-40.
[24] *Id*. at 29.

the Senate; two additional members, who could not be of the same political party, appointed by the Governor; one member each appointed by the Attorney General and Comptroller, and one member each appointed by the legislative leaders.[25] In addition, the NYSBA recommended that the independence of the ethics agency be safeguarded by secured annual funding.[26]

Finally, the NYSBA stressed that the CPI and the LEC should have roles that go beyond their enforcement authorities. Both agencies provide ethical advice and issue advisory opinions, collect and manage financial disclosure statements, and ensure transparency through periodic reporting by lobbyists and their clients. As such, the NYSBA recommended the creation of two distinct bureaus that would report to the same executive director. One would receive requests for, and proffer advisory opinions, as well as receive and review financial disclosure statements and lobbyist reports, while the other would be concerned only with the investigation of ethics violations.[27] The NYCBA concurred in that any new ethics agency should have the power to conduct meaningful investigations, with the authority to issue subpoenas.[28]

C. The Creation of JCOPE

PIRA amended New York's Executive Law to create JCOPE out of the old CPI. PIRA acknowledges the continued existence of the LEC, but with more limited authority. JCOPE has the authority to oversee and investigate the conduct of employees and elected officials in both branches of government, as well as lobbyists, while the LEC has the authority to impose penalties on legislators and legislative branch employees who violate their ethical obligations or fail to file the required disclosure forms.[29]

JCOPE is composed of fourteen members serving staggered five-year terms:

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[25] NYSBA Report at 36.
[26] NYCBA Report at 43.
[27] NYSBA at 36-37
[28] NYCBA at 40-42.
[29] 2011 N.Y. Laws 399

- six members appointed by the Governor, with three from the major party of which the Governor is not a member;
- three appointed by the Senate President;
- three appointed by the Speaker of Assembly;
- one appointed by the Senate Minority Leader; and
- one appointed by the Assembly Minority Leader.

The pool of potential appointees is limited to those who have not served as a registered lobbyist in the last three years or served as a statewide office holder, legislator, state commissioner, or political party chairman in the last year. As was the case with the CPI, the governor has the authority to appoint the chair of JCOPE. The executive director is appointed by the Commission itself under a special voting procedure. The procedure requires the concurrence of at least one member appointed by the Governor from each of the two major political parties, and at least one member appointed by the legislative leaders from each of the two major political parties.[30]

JCOPE has the power and responsibility to investigate violations by persons in either the legislative or executive branches, or by a lobbyist or lobbying client, of the ethics, disclosure and lobbying laws it administers. However, in order to initiate an investigation, eight members of JCOPE must consent and, unless the investigation involves a lobbyist, at least two of the eight members must be from the other party and branch. JCOPE's jurisdiction to impose penalties, including a referral for a criminal prosecution and the forfeiture of a public servant's pension, is limited to executive employees and lobbyists. With respect to legislators, JCOPE can only

[30] *Id.*

provide a report to the LEC, which will determine what, if any, sanction or penalty will be imposed. The LEC's disposition of the matter must be made public.[31]

JCOPE, like the CPI, also has the power to issue guidance and advisory opinions. Among the duties JCOPE acquired from the former CPI is the development of an online ethics training programs for government officials and employees. The enacting statute contained a new provision for the ethics training of lobbyists.[32]

D. Public Reaction to JCOPE

Among the improvements cited by PIRA's supporters is that JCOPE has some authority over ethical lapses by legislators as well as executive branch members.[33] Detractors raised concerns stemming from JCOPE's structure. Critics noted that even though JCOPE was the largest such ethics agency in the nation at fourteen members,[34] the dissent of only two members can thwart the initiation of an investigation. This has been called the potential "Achilles heel" of the agency.[35] Twelve commissioners can vote to proceed with an investigation of the executive branch and yet the opposition of two members can prevent it.[36] Thus, JCOPE may be "far more prone to partisan vetoing of investigations than the" CPI.[37] In fact, it has been suggested that JCOPE may be "so deeply flawed in its structure as to be wholly ineffective."[38] Governor

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31 *Id.*
32 *Id.*
33 Joel Stashenko, *Appointment of D.A. to Chair Ethics Commission Signals More Aggressive Approach, Experts Say*, N.Y.L.J., Dec. 19, 2011.
34 *Ethics: State Ethics Committee*, NATIONAL CONFERENCE OF STATE LEGISLATURES, www.ncsl.org/research/ethics/state-ethics-commissions.aspx
35 Stashenko, *supra* n.33.
36 Danny Hakim, "Ethics Commission Quietly Names New Director," N.Y. TIMES, Feb. 2, 2012.
37 LeBrun, *supra* n.11.
38 *Ethics Reform, Albany Style*, N.Y. TIMES, June 7, 2011 at A30, *available at* http://www.nytimes.com/2011/06/07/opinion/07tue1.html.

Cuomo has acknowledged that "[t]o the extent that we need to make some tweaks to the law…then that's something that needs to be entertained."[39]

Comment was also made of the time it took between Governor Cuomo's signing of PIRA on August 15, 2011 and the appointment of members to JCOPE on December 12, 2011.[40] During this time the old CPI ran on a skeleton staff and continued to receive filings and provide records to the public, but its ongoing enforcement actions were held in abeyance until JCOPE was up and running.[41]

There also have been questions concerning some of JCOPE's early operating procedures. While Governor Cuomo's designation of Janet DiFiore, a sitting district attorney, as the original chair of JCOPE signaled to some a more aggressive approach to enforcing ethics laws in state government, others said that the real question was whether JCOPE would hire experienced investigators to develop its cases.[42] The practice of conducting most of JCOPE's business in private session, and asking observers of the commission's public meetings to identify themselves, has drawn criticism.[43]

Later, when JCOPE announced that Ellen Biben would serve as the Commission's first executive director, some questioned whether her service as Governor Cuomo's deputy at the attorney general's office and as his inspector general would affect her independence.[44] Some felt this concern was reinforced when she announced at her first meeting that JCOPE was part of the executive branch and operated under the jurisdiction of the governor's appointed state inspector

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[39] Nick Reisman, *Cuomo: Changes May Be Needed for JCOPE*, NY STATE OF POLITICS, May 21, 2012, *available at* http://www.nystateofpolitics.com/2012/05/cuomo-changes-may-be-needed-for-jcope/

[40] *Governor Cuomo and Legislative Leaders Appoint Member to the Joint Commission on Public Ethics*, NY GOVERNOR, Dec. 12, 2011, *available at* http://www.governor.ny.gov/print/2138.

[41] David Howard King, *Is the Long Wait for New Watchdog Nearing its End*? GOTHAM GAZETTE, Oct. 27, 2011, *available at* http://www.gothamgazette.com/index.php/government/854-is-the-long-wait-for-a-new-watchdog-nearing-its-end-

[42] Stashenko, *supra* n.33.

[43] Hakim, *supra* n.36.

[44] *Id*.

general.[45] Legislators disagreed, claiming that boards where most of their members were appointed by legislative leaders have traditionally been considered under the jurisdiction of the Legislature.[46]

JCOPE's beginnings signaled a "rocky start". After short tenures with the Commission, both Ms. DiFiore and Ms. Biben resigned from JCOPE in 2013. Ms. DiFiore, who continued to hold her position as Westchester District Attorney and raise campaign funds while serving as JCOPE's chair, resigned in April 2013 to focus on her re-election.[47] The issue of her fundraising had been a source of controversy during her sixteen months as chair.[48] Governor Cuomo replaced Ms. DiFiore a month later by elevating one of his appointees to JCOPE, Daniel Horwitz, a partner at the New York City law firm of McLaughlin & Stern, LLP and a former New York County Assistant District Attorney.[49]

In May 2013, after Ms. Biben announced that she would be leaving, [50] and JCOPE began running newspaper advertisements seeking to fill the executive director vacancy. [51] Commissioner Ellen Yaroshefsky, an appointee of Assembly Speaker Sheldon Silver, publicly advocated that the Commission take the time and expend the resources to conduct a national search for a new executive director.[52] In October 2013, JCOPE named Letizia Tagliafierro, who

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45 *Legislative Appointees Question NY Ethics Board*, THE WALL STREET JOURNAL, Feb. 28, 2012.

46 *Id*.

47 Jimmy Vielkind, *JCOPE Director Biben is Resigning*, ALBANY TIMES UNION, May 2, 2013, *available at* http://www.timesunion.com/local/article/JCOPE-director-Biben-is-resigning-4484668.php.

48 David Howard King, *Cuomo Appoints New JCOPE Chair As DiFiore Resigns*, GOTHAM GAZETTE, Apr. 22, 2013, available at http://www.gothamgazette.com/index.php/the-eye-opener/entry/state/2013/04/22/cuomo-appoints-new-jcope-chair-as-difiore-resigns-

49 *Id*.

50 Viekland, *supra* n.47.

51 James M. Odato, *Agency Seeks Qualified Cop*, ALBANY TIMES UNION, Aug. 4, 2013, *available at* http://www.timesunion.com/local/article/Agency-seeks-qualified-cop-4706640.php.

52 Glenn Blain, *Former Gov. Cuomo Aide Letizia Tagliafierro Named Executive Director of Joint Commission on Public Ethics*, NY DAILY NEWS, Oct. 30, 2013, *available at* http://www.nydailynews.com/news/politics/tagliafierro-named-executive-director-joint-commission-public-ethics-article-1.1501065

had served as JCOPE's first director of investigation, to fill the position.[53] According to one media article, Ms. Yaroshefsky quit in apparent protest over the failure to launch a national search.[54]

In addition to Ms. Yaroshefsky, three of the other original JCOPE commissioners have resigned.[55] Ravi Batra, an outspoken appointee of Senate Democratic Leader John Sampson, resigned expressing protest over how the Commission has been run.[56] Commissioner Pat Bulgaro resigned without stating a reason for his resignation, but he had complained publicly about leaks from the Commission to the media during the Commission's investigation of Assembly Member Vito Lopez.[57] Commissioner Vincent Delorio resigned, citing "personal and professional commitments."[58]

The highly credentialed individuals who have served JCOPE in its start-up period deserve great appreciation and thanks. The Review Group emphatically underscores that no criticism of character, integrity or competence is intended or implied here. At the same time, it is simply to be recognizing reality to note that the departure of so many individuals during JCOPE's short existence has left the Commission in a near constant state of change that has no doubt made it more difficult for the Commission to do its job. Those appointing JCOPE Commissioners naturally want to appoint persons well suited by reason of character, aptitude and experience and in that regard their choices should take account of the need for the appearance of independence

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53 Jessica Alaimo, *JCOPE, Again, Confronts a Leadership Issue*, CAPITAL NEW YORK, Oct. 29, 2013, *available at* http://www.capitalnewyork.com/article/politics/2013/10/8535214/jcope-again-confronts-leadership-issue.

54 Blain, *supra* n.52.

55 *Cf. Cuomo, legislative leaders name JCOPE members*, ALBANY TIMES UNION, Dec. 12, 2011, *available at* http://blog.timesunion.com/capitol/archives/95460/cuomo-legislative-leaders-name-jcope-members/ *with* JCOPE, *About Us, The Commission*, http://www.jcope.ny.gov/about/commission.html.

56 Liz Benjamin, *Batra Quits JCOPE*, STATE OF POLITICS, Sept. 7, 2012, *available at* http://www.nystateofpolitics.com/2012/09/batra-quits-jcope/.

57 Karen DeWitt, *Appointees Resign Amidst Lack of Faith in Ethics Panel*, NORTH COUNTRY PUBLIC RADIO, July 31, 2013, *available at* http://www.northcountrypublicradio.org/news/story/22456/20130731/appointees-resign-amidst-lack-of-faith-in-ethics-panel.

58 *Another JCOPE Resignation*, CAPITAL NEW YORK, Dec. 24, 2013, *available at* http://www.capitalnewyork.com/article/albany/2013/12/8537918/albany-pro-another-jcope-resignation.

from the appointing authority, a standard that seems currently met. Now it is time for a fresh start with the strong showing that the Review Group believes would be achieved were JCOPE to act on our, or similar, recommendations.

III. THE REVIEW GROUP'S ASSESSMENT

A. JCOPE's Enforcement Activities

At the heart of JCOPE's effectiveness and its ability to discharge its statutory mission of improving public trust in government is the vigor with which it enforces the laws that it administers. When JCOPE was established many were skeptical of its enforcement capacity due to the special voting requirements applicable to enforcement actions. These requirements effectively give an enforcement veto to the appointees of the legislative leaders in the case of targets of investigation who are members of the Legislature, or employed in the Legislative Branch, and to appointees of the Governor as to targets of investigation employed in the Executive Branch. The requirements also give an enforcement veto to those appointed by legislative leaders of one party in the case of targets of enforcement who are members of that party. These provisions, while said to be justified on the basis of separation of powers concerns and the need to avoid politically motivated enforcement actions, also serve to undermine the full independence of JCOPE.[59]

To date, JCOPE has had few chances to demonstrate the breadth and efficacy of its enforcement powers, notwithstanding these provisions. However, the Commission's investigation into sexual harassment allegations against former New York Assemblyman Vito Lopez has come to serve not only as JCOPE's most high-profile effort, but also as the primary

[59] JCOPE's scope and authority are set forth in Executive Law § 94. The special voting requirements, discussed in more detail below, are set forth in Executive Law § 94(13)(a).

example of the limitations the Commission's structure creates for the Commission's ability, both in fact and appearance, to investigate ethical misconduct in state government with full independence in both appearance and fact. It must be emphasized that since the primary purpose of JCOPE is to promote a restoration of public trust in government, something now lacking, the independence of JCOPE must be judged at least in part by the standard of the appearance of JCOPE's independence. In doing so the Review Group wishes to emphasize that it is not making any conclusion that JCOPE should have found misconduct beyond what it found. We accept JCOPE's findings of fact. Thus we are not passing on the merits of these matters, but only on the question whether JCOPE's enforcement work met the basic test of pursing a matter wherever it might lead without fear or favor.

1. JCOPE's Investigation of Assemblyman Lopez

a. Factual Background[60]

From at least 2010 until 2012, Assemblyman Vito Lopez "engaged in an escalating course of conduct with respect to multiple female staff members."[61] The conduct included "demeaning comments about appearance and dress as well as demands for fawning text and email messages."[62] This escalated to "requirements for companionship outside the office, and culminated in attempted or forced intimate contact."[63] Mr. Lopez rewarded female employees who tolerated his behavior or acceded to his demands with cash gifts, promotions, salary increases, and plum assignments."[64] If female staff members resisted or were "not sufficiently demonstrative in their praise," he "punished them with removal from important assignments,

[60] Unless otherwise noted, all details from this section are taken from State of New York Joint Commission on Public Ethics, *In the Matter of an Investigation of Assemblymember Vito Lopez*, Substantial Basis Investigation Report (February 12, 2013) (hereinafter "Substantial Basis Report") as articulated in pages 1-3 and further supported in the balance of the report.

[61] Substantial Basis Report, p. 2

[62] *Id.*

[63] *Id.*

[64] *Id.*

public berating, and threats of demotion or job termination."[65] He also "used his position and resources as an elected official to threaten or punish certain individuals, including those who left his office, and thereby created an environment that discouraged staff from making complaints or availing themselves of any form of redress against him."[66] The first formal complaint of harassment was not filed until December 2011, though additional complaints were filed in January and July 2012. The complaints detailed Mr. Lopez's habitual inappropriate behavior towards female staffers both within and without the workplace, as well as numerous instances of abuse of government funds and misuse of Mr. Lopez's position and influence as a member of the Assembly.

The complaints from December and January were not referred to the Assembly Ethics Committee for investigation, despite written policies that mandated such referral. Instead, they were handled by the complainants' legal counsel, members of the Assembly staff and on occasion by Speaker Silver himself. A private and confidential settlement was negotiated among Mr. Lopez, the complainants, Speaker Silver, and their respective counsel. The complainants' allegations were not investigated and no measures were taken to protect other staff members in the Lopez office.[67] Subsequent investigations revealed that Assembly staff, not the complainants, were responsible for the decisions to make the settlement confidential.[68] Assembly staff were also responsible for the decision not to refer the complaints to the Ethics Committee, and the Speaker endorsed that decision.[69] Counsel for the Majority, despite conferring with the Office of the Attorney General (OAG) in drafting the settlement agreement and despite awareness that it was OAG policy to not include confidentiality provisions of any

[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 41.
[69] *Id.* at 2.

kind in such a settlement agreement,[70] nevertheless pressed for confidentiality in this case, an action that, according to JCOPE, raised a "number of public policy concerns."[71] Additionally, the Assembly funds that formed part of the settlement payment were paid from an obscure account whose title, "Miscellaneous Contractual Services Account", misrepresented the nature of the payment and therefore served to conceal even the fact of a confidential settlement, let alone the identity of the parties.[72] It was not until the July 2012 complaints by two additional staff members of Lopez that the Assembly Ethics Committee investigated Mr. Lopez's conduct.

In its report, JCOPE found a substantial basis to conclude that Mr. Lopez, through his abusive conduct, "used his office to pursue a course of conduct that was in violation of his public trust, to secure unwarranted benefits, and to give a reasonable basis for the impression that one could unduly enjoy his favor in the performance of one's official duties."[73] It made no finding as to whether there was a substantial basis to conclude that the Speaker or any member of his staff or any other parties had violated ethics laws administered by JCOPE. JCOPE noted that the scope of the investigation was confined to Assemblyman Lopez. The Report contains no indication of whether JCOPE considered extending its investigation to other participants in the settlement, including the Speaker and/or his staff. JCOPE has declined to answer that question on the ground of confidentiality.

b. Analysis

It is important to distinguish between the violation of ethical standards and the violation of civil and criminal laws. In the Lopez case, the central issue of misconduct was Mr. Lopez's alleged sexual harassment of his staff members. This conduct (if proven) was unethical because

[70] *Id.* at 43.
[71] *Id.* at 66.
[72] *Id.* at 45.
[73] *Id.* at 67.

it involved an abuse of official position, but it was also a civil wrong that carried potential legal liability for Mr. Lopez, and possibly his employer. Also, as lawyers well know, the manner in which a civil matter is handled can have ethical consequences. That is equally true of the manner in which a public officer handles a civil matter and particularly its settlement. As an ethical matter, a settlement with state funds must serve the interests of the State of New York and not just the interests of the person approving the settlement or the person whose conduct is the subject of the settlement. In this connection ethics laws reach conduct that, while not criminal, may give rise to the appearance of wrongdoing. There are elements of the Lopez case that reveal potential ethical failings that do *not* rise to the level of a violation of civil or criminal laws. It is this conduct that is the particular job of JCOPE to identify and sanction.

A threshold question is whether the facts set forth in JCOPE's Lopez Report implicate questionable conduct that might give rise to a possible ethics violation by the Speaker and his staff warranting further investigation and possible action by JCOPE. The New York State Code of Ethics, found in section 74 of the Public Officers Law, has several relevant provisions. Under the Code, it is a violation for a member of the legislature or a legislative employee to "use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself, herself or to others" (Public Officers Law § 74(3)(d)). It is also a violation for any such person to "by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person" (Public Officers Law § 74(3)(f)). Finally, such members and employees of the legislature are under an affirmative duty to "endeavor to pursue a course of conduct which will not raise suspicion

among the public that [they are] likely to be engaged in acts that are in violation of [their] trust" (Public Officers Law § 74(3)(h)).

If we consider the facts of the Lopez case in the public record in light of these ethical standards, then under § 74(3)(d) the actions which led to the private settlement of the Lopez complaints with public funds merited an investigation by JCOPE, at least on the basis that not disclosing Mr. Lopez's wrongdoing publicly, or even to the Assembly Ethics Committee, may have secured unwarranted privileges or exemptions for Mr. Lopez. § 74(3)(f) may have been violated if the facts demonstrated that Mr. Lopez received this favor on account of his position in the Assembly or as an influential member of the majority party in the Assembly. And § 74(3)(h) may have been violated if the conduct of those involved in the settlement gave rise to reasonable suspicion that they were acting in violation of their public trust when they brought about a confidential and hidden settlement without referring the matter for investigation in accordance with established legislative policy.[74] We draw no conclusions as to whether such violations occurred, only that a JCOPE investigation into these matters was warranted.

We do not know why JCOPE's Lopez Report did not address these potential violations. The law calls for a special vote in order for JCOPE to investigate a subject matter. Such a vote takes place either upon sworn complaint of a violation or on the Commission's own initiative.[75] In order to commence a full investigation of matters under consideration, at least eight of the fourteen members of the Commission must vote in favor.[76] However, additional requirements are added when the subject of an investigation is a member of the legislature.

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[74] Danny Hakim, et al, *Assembly Leader Admits Fault as Critics Assail Secret Payoff*, N.Y. TIMES, Aug.28, 2012 at A1, *available at* http://www.nytimes.com/2012/08/29/nyregion/lopez-to-yield-party-leadership-role.html.

[75] N.Y. Executive Law Sec. 94(13)(a)

[76] *Id.*

> "Where the subject of such investigation is a member of the legislature or a legislative employee or a candidate for member of the legislature, at least two of the eight or more members who so vote to authorize such an investigation must have been appointed by a legislative leader or leaders from the major political party in which the subject of the proposed investigation is enrolled if such a person is enrolled in a major political party."[77]

Under this voting standard, the vote of the majority does not necessarily control. Of the fourteen JCOPE commissioners, three are appointed by the Senate President and three are appointed by the Speaker of the Assembly. Only one is appointed by the Senate minority leader and only one is appointed by the minority leader of the Assembly. The remaining six are executive appointments by the Governor and the Lieutenant Governor.[78]

When both houses of the legislature are controlled by the same party, only two commissioners are appointed by members of the minority. Thus under the rule set forth above, for JCOPE to investigate any legislator or legislative employee who is a member of the minority party, both appointees of the minority must join in the vote. A single dissent by either commissioner results in a defeat of the vote regardless of the actual margin.

In situations where Senate and Assembly majorities differ, three appointees of the investigative subject's party can vote together to prevent an investigation, even if the Commission as a whole votes 11-3 in favor of investigating. Under such a scenario, even an overwhelming majority is not sufficient to invoke JCOPE's investigative and enforcement powers to police legislative ethics.

Without knowing what actually transpired during JCOPE's deliberations and its investigation of the Lopez case, such an anti-majoritarian vote, had it taken place, could have blocked the extension of the investigation to other persons whose conduct merited further inquiry.

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[77] *Id.*
[78] N.Y. Executive Law Sec. 94(2)

Because JCOPE's practice is to keep the results of such votes secret (a practice we advocate changing), we do not know whether or not such a counter-majoritarian overrule took place. But the facts disclosed in the Commission's Substantial Basis Report on the Vito Lopez matter clearly provided grounds for extending the investigation. At the same time, the Lopez Report makes clear that only Assemblymember Lopez was made a subject of investigation.[79] At a minimum, the "micro-minority veto" in JCOPE's voting structure is antithetical to its purpose as a commission to restore public confidence in government and creates an appearance of lack of independence that is inconsistent with the mandate of an independent investigative body. JCOPE was created to a great extent to separate in fact and appearance ethics and lobbying enforcement from political influence. The Lopez Substantial Basis Report strongly suggests that that objective has not been achieved.

c. Recommendations

Modifying the Special Vote Requirement

The special vote requirement has two aspects of protection: protection against one branch of government seeking to dominate the other and protection against the members of one major political party seeking to unfairly disadvantage the other. The way the special vote requirement is structured, the political party protection component applies only if the person being investigated is a member of the Legislature or employed in the Legislative Branch. There is no political party protection for statewide elected officials or political appointees in the Executive

[79] In presenting its findings about the confidentiality portion of the settlement, JCOPE concludes that "Confidentiality clauses that shield a public officer or institution from disclosure of allegedly improper or illegal conduct, however, raise a number of public policy concerns and should be subject to a high degree of circumspection." Substantial Basis Report p. 66. But immediately afterwards, JCOPE clarifies that "The Commission authorized the investigation of alleged violations of the Public Officers Law *by Lopez*. Under the record here, the evidence does not establish such a violation *by Lopez* with respect to the inclusion of the confidentiality clause in the Settlement Agreement." *Id.* (emphasis added). In presenting its conclusions, JCOPE was careful to ensure that its findings extended only to Lopez because only Lopez was an authorized target of the investigation.

Branch. While there is a constitutional right to form political parties, there is no constitutional requirement that party members be given the special protection that JCOPE's special voting requirement affords them.

The Review Group recommends that the political party protection aspect of the special voting requirement that is now applicable only to the Legislative Branch be eliminated. This would place the Legislative Branch and the Executive Branch on an equal footing. If the person to be investigated was a member of the Legislative Branch, two appointees of the legislative leaders would have to concur. If the person is a member of the Executive Branch, and assuming that the Governor continues to have six appointments, two appointees of the Governor would have to concur.

Political party protection measures impede effective enforcement. The Commission to Investigate Public Corruption Preliminary Report ("Moreland Commission Report") has recently singled out the political party protection mechanism found in the membership structure of the New York State Board of Elections as a cause of the poor enforcement record of that body. Moreover, it is the rare elected official who does not claim that even legitimate scrutiny of his or her conduct is politically motivated. Finally, the political protection provision is simply unsustainable in the circumstance where two houses of the Legislature are controlled by the same political party, since a single vote could block an investigation supported by thirteen Commissioners.

Greater Transparency in the Enforcement Process

Whether or not the recommendation set forth above is adopted by the Legislature and approved by the Governor, we believe that JCOPE has the power without new legislation to ensure public accountability whenever a special vote is used to block the action desired by the

majority. JCOPE has the power by a simple majority vote to disclose the use of an anti-majority veto for the reasons explained below. The public could then be the judge of whether the exercise of an anti-majority veto was appropriate. This disclosure to the public is particularly appropriate where an investigation into subject matter has been authorized and a veto is used to block the addition of new subjects of inquiry recommended by the JCOPE staff. Such action blocks pursuing an investigation wherever it objectively may lead.

We understand that the Commission is bound by certain confidentiality requirements, the violation of which is a class A misdemeanor.[80] But under Section 94(9-a) of the Executive Law, confidentiality covers only testimony and information received by a commissioner or staff member, and does not extend to the fact that a veto has been exercised to block a particular investigation or to add a particular person as a subject of that investigation.[81] Moreover, the confidentiality requirement applies only "during the pendency of any matter" and therefore does not bar disclosure of the use of a veto to block an investigation, or to include in any final report information about the use of a veto to limit the scope of an investigation. Indeed, in our opinion JCOPE could by majority vote now decide to disclose whether a veto was used to prevent the expansion of the Lopez investigation. We urge them to do so.

Greater Staff Autonomy

Because of the political nature of JCOPE's appointment process, the commissioners' impartiality may reasonably be questioned by the public. The JCOPE professional staff, in contrast, is further removed from the political process of appointment and indeed must have support in both branches and by legislative leaders in both parties. We are concerned that the JCOPE staff is in peril of being unduly inhibited in its ability autonomously to pursue suspicions

[80] N.Y. Executive Law Sec. 94(9-a)(c)
[81] N.Y. Executive Law Sec. 94(9-a)(b)

and allegations of ethical violations, particularly as the objective basis for an expanded investigation may arise during ongoing investigations.

We believe the staff's lack of autonomy once a general investigation into a matter has been initiated is one of the Commission's own self-imposed practices and not one required by law. In particular, the JCOPE enforcement process includes the use of so-called 15 day letters which alert a person that he or she may become the subject of an investigation, and provides that person with an opportunity to present information in his or her defense. No special vote is required to issue a 15 day letter, and under the JCOPE statute the authority to do so may therefore be delegated to JCOPE's Executive Director. We urge JCOPE promptly to issue a rule of procedure that delegates that authority.

Erecting a Firewall Between JCOPE Commissioners and the Public Officials Who Appointed Them

It should be obvious that as an adjudicative authority JCOPE Commissioners may not have any ex parte contact whatsoever with regard to any pending enforcement proceeding.

Beyond this, however, we think it would be desirable for JCOPE or the legislature to formally create a "firewall" between the Commissioners and the elected official who appointed them.[82] Such a step would go far to improving the public perception of JCOPE's independence. It would also be a clear confirmation of the fact that the Commissioners are accountable not to those who appointed them, but to the public and the best interests of the State of New York. A Commissioner should never take instructions from anyone including, most particularly, the elected official who appointed them or a member of that person's staff. The creation of a firewall would not adversely affect the work of JCOPE since the views of the appointing

[82] Governments use firewalls to deal with conflict situations where a particular governmental decision-maker must be recused from a matter and it is appropriate to bar discussion between those handling the matter and that recused person. There seems to be no reason not to use this same procedure with the Commission to assure independence in fact.

officials could be aired publicly, in open meetings, or in written communications with the entire Commission or with staff.

Guidance regarding § 74(3)(f) and § 74(3)(h)

At various places in the New York State Ethics Laws, various breaches of the Code of Ethics are sanctioned by specific punitive consequences in the form of a restitutionary civil penalty for the benefit received, plus $10,000.[83] However, paragraph f (dealing with improper influence) and paragraph h (dealing with breach of trust) of Public Officers Law § 74(3) are not included in these specific restitution provisions. In the course of our review it has been suggested that this fact means that there is no penalty for a violation of these provisions.

JCOPE should take steps to correct this misimpression. The first sentence of § 74(4) of the Public Officers Law provides that "[i]n addition to any penalty contained in any other provision of law any such officer, member or employee who shall knowingly and intentionally violate *any* of the provisions of this section may be fined, suspended or removed from office or employment in the manner provided by law" (emphasis added). Clearly, paragraphs f and h fall under this provision. Thus while sections f and h are not subject to a civil penalty for restitution, they are subject to significant sanctions.

[83] Executive Law § 94(14) provides that "An individual who knowingly and intentionally violates the provisions of paragraph a, b, c, d, e, g, or i of subdivision three of section seventy-four of the public officers law shall be subject to a civil penalty in an amount not to exceed ten thousand dollars and the value of any gift, compensation or benefit received as a result of such violation." Public Officers Law § 74(4) provides that "Any such individual who knowingly and intentionally violates the provisions of paragraph b, c, d or i of subdivision three of this section shall be subject to a civil penalty in an amount not to exceed ten thousand dollars and the value of any gift, compensation or benefit received as a result of such violation. Any such individual who knowingly and intentionally violates the provisions of paragraph a, e or g of subdivision three of this section shall be subject to a civil penalty in an amount not exceed the value of any gift, compensation or benefit received as a result of such violation."

We urge the Commission and the LEC to issue guidance concerning the sanction options available to it and the LEC for any violation of the State Code of Ethics. Due notice of potential sanctions is desirable to avoid any risk of a due process challenge. The available sanctions include private reprimand, public reprimand, suspension from office, removal from office and fine. JCOPE and the LEC should publish sanction guidelines comparable to those adopted by the American Bar Association for violations of the rules of ethics for lawyers,[84] but it first should make clear that no provision of the State Code of Ethics may be violated with impunity.

Ethical Duty to Report the Criminal or Fraudulent Behavior of Public Officers

The legal profession is subject to an ethics code which carries possible sanctions for its violation. In New York, the Rules of Professional Conduct place an affirmative duty upon lawyers to report when another lawyer has violated the Rules in such a way that "raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness."[85] The Rules also permit an exception to the otherwise strongly protected lawyer's duty of confidentiality when a lawyer knows of a client's intent to commit a crime or a client's continuing crime or fraud, allowing a lawyer to report the intent or the ongoing crime or fraud because of society's "important interests" in preventing contemplated or ongoing crimes.[86]

The Review Group believes that any failure of a public officer to report an ongoing crime or fraud being committed by another public officer would constitute a breach of public trust and therefore violate the State Code of Ethics. The essence of a public trust relationship is that it can impose affirmative ethical duties to act. That is exactly why lawyers have an ethical duty to make disclosure even though it may be contrary to the interests of their clients. If a public

[84] ABA, *Standards for Imposing Lawyer Sanctions* (1992), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.pdf

[85] New York Rules of Professional Conduct R. 8.3(a) (2009)

[86] New York Rules of Professional Conduct R. 1.6(b) and cmt. 6C (2009)

officer has the power through disclosure to limit the damage to the State and the public being caused by such a crime or fraud, the same standard should apply.

We urge the Commission to issue guidance to this effect using its power to construe the State Code of Ethics. We also urge the Commission to adopt a standard practice to consider the initiation of an investigation whenever the commission of a crime or fraud related to official activities by a public officer is uncovered, where that crime or fraud also implicates breaches of ethical duties by a person or persons who had reasonable foreknowledge of the crime or fraud, who failed to act report it and whose office and actions were covered by the Code.

At the same time JCOPE should adopt anti-retaliation rules akin to the provisions found in the Sarbanes-Oxley legislation (18 USCA § 1514A) and other statutes to protect those who report ethical violations. JCOPE can do this without new legislation because it would be an ethical breach for a person within the Commission's jurisdiction to retaliate against a person for reporting misconduct. By way of analogy, New York courts have given strong protection against reprisal to lawyers who report substantial ethics violations of other lawyers, including those holding senior positions in the law firms in which they are employed. The New York Court of Appeals ruled in *Wieder v. Skala* that even an at-will associate with no contractual rights to continued employment was nevertheless protected from retaliatory dismissal stemming from his effort to report a colleague's ethical violations.[87] JCOPE should take the opportunity of issuing guidance on reporting misconduct to emphasize its commitment to these protections.

B. JCOPE's Regulation of Lobbyists

The work of lobbyists is protected under the First Amendment, which includes protection of the right of the people to petition government for the redress of grievances.[88] Despite this

[87] Wieder v. Skala, 609 N.E.2d 105 (1992)
[88] U.S. Const. amend. I

protection, however, it is permissible to require lobbyists to make public disclosure about their activities[89] and, of particular relevance here, to restrain the manner in which they conduct their business so as to avoid an appearance of a substantial risk of corruption of the public officials with whom they interact. *See Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

The Review Group believes that, consistent with the First Amendment, JCOPE can and should do much more to increase the quality of public disclosure by lobbyists, to make that information available to the public media and the general public in a uniform and user-friendly way and to hold lobbyists accountable to ethical standards reasonably calculated to curtail activities that create an appearance of a risk of corruption. The Review Group is also of the view that these much needed improvements would not require the enactment of legislation and that all that is required is the will and initiative on JCOPE's part to pursue the purpose of the ethics and lobbying laws it administers.

1. Public Disclosure of a Lobbyist's Activities

a. Analysis

Under Article 1-A of the Legislative Law, the central body of law regulating lobbyists, lobbyists are required to file annual registration statements and, if the lobbying expenditures exceed $5,000, bimonthly reports.[90] A separate filing must be made for each client.[91] These reports must contain certain information including "the name of the person, organization, or legislative body before which the lobbyist is lobbying or expects to lobby..."[92] However, an examination of filed reports on the JCOPE website makes it clear that the quality of the

[89] *See* U.S. v. Harriss, 347 U.S. 612 (1954) (finding the Federal Regulation of Lobbying Act constitutional despite a claim of unconstitutionality by lobbyists because restrictions such as a registration and disclosure requirement do not effectively prevent the exercise of the right of petition).
[90] N.Y. Legislative Law Art. 1-A, Sec. 1-e, 1-h.
[91] N.Y. Legislative Law Art. 1-A, Sec. 1-e.
[92] *Id.*

disclosure under this latter provision varies widely. Most often disclosure is made of only the broadest category, for example, the disclosure that the Assembly is being lobbied generally with no identification of any particular members or staff.

Information of such generality is nearly useless to the public. Lobbyists should disclose the specific names of the persons with whom they have had a significant[93] lobbying contact or whom they anticipate they will so lobby following the filing. Mere reference to an agency or legislative body is inadequate. The word "or" in the statute cannot, consistent with the purpose of the statute, be read to confer on the lobbyist the ability to make disclosure by the broadest category, if more specific information is available. The function of the word "or" in light of the purpose of the statute should allow a more general answer only when specific information is not known or may need to be supplemented with a general catch-all response. Thus an appropriate answer might be to identify the specific persons who are the subject of a significant lobbying contact (e.g., the person with whom the lobbyist is specifically seeking a meeting and to add a more general catchall for others who might be lobbied).

Article 1-A also requires disclosure of the general subjects of lobbying and the bill numbers assigned to legislation, executive orders and contracts with respect to which the lobbyist has been retained.[94] Bill numbers, while informative to the press and to those who closely follow the Legislature, are of limited utility if the objective is to give the public an easy way to understand a lobbyist's activities.

b. Recommendations

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[93] By significant lobbying contact we mean one that is material to the risk that the public official is selling access to the lobbyist and his or her client in return for campaign contributions or other favors. An example we find troubling would be a sustained merits discussion between a decision maker or senior advisors and the contributor or his lobbyist where no similar opportunity is provided to those who have a substantial disagreement with the position taken by the large contributor.

[94] N.Y. Legislative Law Art. 1-A, Sec. 1-e.

We recommend in our consideration of JCOPE's website below that the JCOPE website aggregate all lobbying disclosures related to a particular bill with identification of that bill's subject matter and a hyperlink to the bill itself. We also recommend aggregation of all data related to the lobbying of a particular person and his or her staff.

Beyond this we think there is a compelling argument that JCOPE has the authority to require a lobbyist to disclose the subject matter of significant lobbying contacts with a particular person so that the public and the public media will know exactly which public official was lobbied about which issue.

First, access to this information is required to fulfill the purpose stated in the Legislative Declaration at the outset of Article 1-A. That declaration calls for the disclosure of the activities of lobbyists with respect to "**any**" legislation or rule or regulation having the force of law.[95] The word "any" makes clear that particularized disclosure is intended because it states that the public should be able to know the activities of lobbyists with respect to "any" bill.

Second, Item 5 in section 1-e(c) calls for information about the topics of lobbying, and Item 6 calls for the name of the persons lobbied. The name of the persons lobbied is of little practical use without knowing the general subject matters on which they were lobbied. Under New York statutory construction law the manifest purpose of the law must be given effect. We can safely presume that the Legislature did not intend the required disclosure to be of little practical utility.[96] To give the disclosure requirements real meaning, JCOPE must be faithful to the purpose of the law and require filers to file an answer to Item 6 for each bill or topic identified in Item 5.

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[95] N.Y. Legislative Law Art. 1-A, Sec. 1-a.

[96] Metropolitan Life Ins. Co. v. Durkin, 276 A.D. 394 (1st Dep't 1950), *aff'd* 301 N.Y. 376 (1950) (finding that the paramount consideration in construing statutes is to ascertain and give effect to the spirit and the purpose of the law and the object to be accomplished by it).

Third, this approach ensures the same level of disclosure for lobbyists who lobby for a client about multiple bills or topics and those who lobby for a client on a single bill or topic.

Finally, this reporting requirement would be a reasonable application of the express power conferred on JCOPE to issue uniform forms for the statements and reports required by Article 1-A.

2. Lobbyist Conduct Creating an Appearance of a Significant Risk of Conflict of Interest

a. Analysis

Codes of Ethics are designed to avoid conduct which creates an appearance in the mind of a reasonable person of improper conduct. Thus Codes of Ethics prohibit conflicts of interest absent consent by all concerned, not because a person's judgment may be impaired by such conduct but because of the appearance of a substantial risk that such judgment might be impaired. In the landmark case of *Buckley v. Valeo* the United States Supreme Court applied this concept to campaign contributions, holding that large contributions could be prohibited because of the risk that the recipient might be beholden to the contributor even if the recipient was totally confident that his or her judgment would not in fact be impaired.[97]

This ethical concept of avoiding an appearance of corruption applies with full force to the work of lobbyists. While the function of a lobbyist is to advocate the position of their clients to the government decision makers, the Moreland Commission Report shows that some lobbyists consider it part of their job to ensure that the decision makers will be beholden to their clients through the making of campaign contributions.

Specifically, the Moreland Commission Report provides this example:

[97] Buckley v. Valeo, 424 U.S. 1 (1976).

> Contributions may also be expected in exchange for political support. In a separate investigation, a lobbyist emailed a prospective client about a bill before the state legislature. In negotiating the terms of his contract, the lobbyist provided the client with what the lobbyist referred to as "a fair projection of expenses." In addition to informing the client of the lobbyist's fees, the "expenses" the lobbyist lined out included costly "political contributions" that the client would have to make to certain elected officials, including the chairs of committees that would have jurisdiction over the bill. In this same investigation, the client complained to the lobbyist in an email that an elected official critical of the bill had received over $50,000 in campaign contributions from an individual who opposed the bill. The client hypothesized that "the money [the individual] spent on [the elected official] is directly related to us" and that such a contribution was an attempt to "pay NOT to let them play."[98]

Currently, New York State does not have a clear rule or regulation in place which speaks to the ethical standards for lobbyists seeking to influence the enactment of legislation, the adoption of rules and regulations or the procurement of government grants and contracts. No line is drawn between conduct which permissibly seeks to influence and that which creates an appearance of an effort to corrupt.

It seems simple and obvious that an ethical standard should be applied to all those who lobby the government. In 2012, JCOPE suggested in its Annual Report that the New York State Legislature enact a Code of Ethics for lobbyists, but the Legislature has failed to act on the recommendation. This inaction cannot be justified by any argument that current law is adequate. Article 1-A says nothing prescriptive about ethics. JCOPE's Guidelines to the New York State Lobbying Act provide no instructions about ethical standards for lobbyists. It falls to JCOPE to take affirmative steps towards remedying this clear gap in the regulation of public ethics provided that JCOPE has the power to do so.

[98] Moreland Commission, Prelim. Report, p. 34 (Dec. 2, 2013).

The Review Group believes that JCOPE has that power. The provision for lobbyists' ethics and campaign contribution law training added to Article 1-A by Chapter 399 of the laws of 2011 gives JCOPE, in our opinion, the power as part of that training to specify ethical standards, including ethical standards that relate to campaign contributions. There is little point instructing lobbyists regarding the ethical standards applicable to others without there being an ethical obligation on the part of the lobbyists both to respect those standards in their own conduct, and to not create an appearance that a public officer is being influenced in a way that contravenes that officer's ethical duty. JCOPE's power to specify ethical guidance for lobbyists is also implicit in the Legislature's decision to delegate the regulation of lobbying to an ethics commission.

We recognize that as a matter of past practice the State's ethics agencies have considered the conflict of interests that arise from campaign contributions to be beyond their purview. The New York State Board of Elections also does not address conflicts of interest arising from large campaign contributions beyond administering a regime of campaign contribution disclosure. The Judiciary, on the other hand, has addressed conflicts of interest arising from campaign contributions by requiring judicial recusal in certain instances.[99] The State Code of Ethics contains no carve out for conflicts arising from campaign contributions and that this is therefore an area in which JCOPE has authority to issue guidance binding on lobbyists and Executive Branch decision makers. Because the LEC had the statutory right to disagree with JCOPE's conclusions of law, it would be highly desirable if JCOPE and the LEC were in agreement on this guidance. In all events, the issuance of such guidance binding on lobbyists should be a

[99] Rules of the Chief Administrative Judge (22 NYCRR) § 151.1 (judicial rule requiring recusal when a judicial assignment "would give rise to a campaign contribution conflict"). *See also* Caperton v. AT Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (establishing that while "not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," exceptional cases "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent" require recusal under the Due Process Clause).

matter of high priority since conflicts of interest arising from large campaign contributions, and the providing of special access to large contributors and their lobbyists, is a prime source of dysfunction in Albany and the lack of public confidence in government.

b. Recommendations

We recommend that JCOPE not continue to wait for legislative action but rather adopt a Code of Ethics specifically applicable to lobbyists and the work they undertake. JCOPE's training of lobbyists should include the ethical standards that cover the obligation of candor to the government, fidelity to the legitimate interests of the client, avoidance of conflicts of interest, as, for example, by representing clients with conflicting interests as to the subject matter of the representation and, most particularly, avoiding any conduct that creates an appearance of a significant risk of corruption on the part of public officers, or of encouraging them to breach their public trust or appear beholden to large campaign contributors.

Targeted campaign contributions such as those detailed in the Moreland Commission Report should be among those practices which fall outside the permissible ethical behavior for lobbyists. It should also be unethical for lobbyists to bundle contributions so as to effectively be perceived as making a contribution in excess of contribution limits, as this practice creates the appearance of a significant risk of corruption in the form of vote buying. As an ethical matter, it should be made clear that a lobbyist may not use bundling or the arranging of large contributions to buy special access for the lobbyist or his or her client must avoid even the appearance of doing so by refraining from participating in such special access when it might reasonably be tied to a large campaign contribution.

Other states have already recognized the need for such rules and that certain activities fall outside of what would be reasonable ethical conduct for lobbyists. For example, Connecticut's Client Lobbyist Guide to the Code of Ethics, while recognizing that political contributions are permissible, prohibits any such contribution from being offered with the understanding that a vote, official action or judgment of the recipient would be influenced by the contribution.[100] Similarly, California's Government Code includes prohibitions on lobbyists influencing a bill or creating an appearance of public favor of any proposed legislative action, in addition to engaging in any deceitful or fraudulent activities.[101] The American League of Lobbyists has implemented its own Code of Ethics which has specific articles addressing honesty and integrity, professionalism, conflicts of interest, and best efforts.[102] The Review Group is of the opinion that New York State should be a leader and not a laggard in this area.

While we urge JCOPE to take a view of its jurisdiction broad enough to achieve the purposes for which it was created, should JCOPE be of the view that it lacks the power to promulgate a Code of Ethics for Lobbyists, then JCOPE should do more than call on the Legislature to adopt one. Rather, JCOPE should draft and propose a specific Code of Ethics for Lobbyists as part of its legislative program. In the interim, its training of lobbyists should encompass, at a minimum, training as to what conduct might subject a lobbyist to complicity in a violation of laws related to campaign contributions, bribery, and breach of trust by public officers.

C. The JCOPE Website

JCOPE regulates the ethics of public officers and the lobbyists who seek to influence their decisions. At the heart of these tasks is public disclosure of information about the conflicts

[100] CT Code of Ethics § 1-97 (Jan. 1, 2013).
[101] Cal. Gov't Code § 86205
[102] ALL Code of Ethics, Arts. I, III, IV, & V (Nov. 2010).

of interest and special interest pressures to which these public officers are subject. While it is important to provide an electronic means of reporting misconduct, learning about JCOPE's activities and watching webcasts of its meetings, the core test of the website is the easy accessibility of information about who is seeking to influence whom about what, by what means and at what cost.

The deficiencies of the JCOPE website are not attributable to any lack of authority. Executive Law § 94 provides for the creation of a publicly accessible website that makes available public officials' financial disclosure forms, various documents related to enforcement actions against public officials, and "any other records or information which the commission determines to be appropriate."[103] (emphasis added). In other words, subject only to cost and the availability of good data, JCOPE is free to make its website a comprehensive repository for all information bearing on conflict of interest and special interest advocacy in the decision making processes of New York State Government.

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[103] Executive Law § 94(18) provides: "[T]he commission shall create and thereafter maintain a publicly accessible website which shall set forth the procedure for filing a complaint with the commission, and which shall contain the documents identified in subdivision nineteen of this section, other than financial disclosure statements filed by state officers or employees or legislative employees, and any other records or information which the commission determines to be appropriate."

Executive Law § 94(19)(a) provides: "Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection and copying are:

(1) the information set forth in an annual statement of financial disclosure filed pursuant to section seventy-three-a of the public officers law except. . . information deleted pursuant to paragraph (h) of subdivision nine of this section;
(2) notices of delinquency sent under subdivision twelve of this section;
(3) notices of civil assessments imposed under this section which shall include a description of the nature of the alleged wrongdoing, the procedural history of the complaint, the findings and determinations made by the commission, and any sanction imposed;
(4) the terms of any settlement or compromise of a complaint or referral which includes a fine, penalty or other remedy;
(5) those required to be held or publicly available pursuant to article one-A of the legislative law; and
(6) substantial basis investigation reports issued by the commission pursuant to subdivision fourteen-a or fourteen-b of this section. With respect to reports concerning members of the legislature or legislative employees or candidates for member of the legislature, the joint commission shall not publicly disclose or otherwise disseminate such reports except in conformance with the requirements of paragraph (b) of subdivision nine of section eighty of the legislative law."

1. Analysis

The JCOPE website is the public's primary point of access to JCOPE and JCOPE's project of transparency. It is therefore necessary to evaluate it from the perspective of a member of the public trying to find information about the efforts to influence public officials. In its current form, JCOPE's website contains a large amount of data, but does not organize the data in an easily searchable way that gives the public meaningful access to information about the money and interest groups behind New York State's decision-making. There is a need for improvement in three key areas: (a) user-friendliness, (b) transparency, and (c) availability of relevant data.

a. User Friendliness

By user-friendliness we mean the ability of a user with a basic level of computer and Internet knowledge to find information contained in a website with ease, and without having to do further research on additional websites.

Large amounts of information filed by lobbyists and elected officials are theoretically accessible through the website, but the information is not available in a user-friendly way. The website itself is not searchable. A user cannot simply type in the name of a public officer, the subject matter of a bill, or the name of a company in which one or more public officers may have a financial interest, and find information relevant to a conflict of interest and lobbying activity. Rather, users must navigate through various links to get to the information they can reasonably be expected to seek.

And when users get to the documents they seek, further difficulties abound. Many of the filings themselves are scanned-in paper documents, a good number of which are handwritten and not easily legible, rather than electronically-searchable files. Moreover, in order to efficiently access material, a visitor to the website would have to know a lot of information in advance. For

example, bills are listed by bill number with no indication of the topic of the bill or link to the bill itself. Users also cannot easily cross-reference the name of the bill externally because the Lobbyist Filing Portal does not provide the year of the bill's proposal.

The website's lack of user-friendliness is apparent from simple efforts to search for disclosure filings of assembly members and lobbyists, and to review enforcement actions.

To search for an assembly member's financial disclosure form on the website, users must already know who represents the assembly district in which they are interested. Searchers should not have to look up this information on a separate website. In a user-friendly website, this information would be available by member name, by assembly district number and by zip code and address. It should not be harder to look up information about the financial interests and outside activities of a member of the Legislature or a policy maker in the Executive Branch than it is to get a weather forecast for a particular location.

Users searching for lobbying filings confront the inverted problem of too many search options. To start, the Database Query page provides fillable forms to execute queries by client, lobbyist, public corporation, lobbyist disbursement, or public corporation disbursement. But there is no guidance as to how this information can be relevant to an assessment of lobbying activity, why its disclosure is required or of the context in which it should be considered. The Run Reports page of the Lobbyist Filing Portal has multiple search fields and lists various report-types, which is confusing, as there are no interpretive tools for users who lack an understanding of the administrative jargon used to describe report types. It is doubtful that a member of the public would necessarily know the difference between procurement and non-procurement lobbying, or would understand how the information in Report A, Additional Lobbyist Terminations, might relate to information provided via Report D2, Client-Lobbyist Cross

Reference. In addition, these reports, which could theoretically be analyzed to compile a web of lobbyist-client relationships, are not in any way integrated into the Database Query page. Thus, the searchable database of lobbyist filings is of very limited utility to individuals who do not have a fairly sophisticated understanding of various lobbying activities, but who seek lobbying information. It is designed to channel queries narrowly, rather than yield a broad overview of lobbying activities. Outside of the Lobbyist Filing Portal, users have the option of piecing together the web of lobbying activity themselves via the "View a Filing" page, but this would be an inefficient and overwhelming task. The data is available to download as massive Excel spreadsheets, which organize the data by year, and within each year alphabetically by lobbyist name. The sort function has been disabled, so users must sift through thousands of pages of data to track a single lobbyist's activity. Clearly, the lobbyist filing database is not set up in a way that provides meaningful access to information on lobbying activities.

The Enforcement Actions section of the website is also needlessly opaque, as it requires significant cross-referencing in order to meaningfully access the information on the website. The Enforcement Actions index page is the only point of access to these records.[104] The index consists of a table listing the name of the individual or organization that was subject to the action; the report and year; the date and status; and the statute allegedly violated. There is nothing identifying the role or position of the subject of the action in the index. As a result, short of clicking through each settlement document, there is no way to determine which, if any, of the individuals listed are legislators. In addition, rather than listing the type or nature of the violation, the index lists only the statute number, and does not provide a live link. Without a link to the statute, users must navigate back through three separate pages to find the link to the statute

[104] New York State Joint Commission on Public Ethics, Enforcement Actions, *available at* http://www.jcope.ny.gov/enforcement/index.html

and search for the provision, which users would then have to parse and interpret on their own. It is worth re-emphasizing that the enforcement records themselves are not text-searchable, and will therefore not return any query results from the search bar on that page.

Based on these examples, which are not exhaustive, it is clear that the website's organizational structure and search mechanisms can be made much more user-friendly particularly from the perspective of the user who is not an insider with sophisticated computer research skills.

b. Transparency

By transparency we mean that the website readily discloses any lack of completeness and helps the user to connect the dots in a way that provides a useful picture of conflict of interest risks and lobbying activities.

A basic requirement of candor requires that the website disclose fully and candidly any limitations or lack of completeness in the information provided. The JCOPE website, contrarily, gives a false impression of completeness. This is because the pages that contain filings and other public records have no mention of exceptions and waivers that make them incomplete. Users have to look up—and then parse and interpret—the enabling legislation on the "About JCOPE" page to discover that certain records may be deleted, expunged or exempt.

Executive Law § 94(9)(h) provides in relevant part that "information … may be deleted by the commission upon a finding by the commission that the information which would otherwise be required to be made available for public inspection and copying will have no material bearing on the discharge of the reporting person's official duties." Such a finding is not even required to remove information temporarily from the website. Executive Law § 94(19)(c) provides: "Pending any application for deletion or exemption to the commission, all information

which is the subject or a part of the application shall remain confidential. Upon an adverse determination by the commission, the reporting individual may request, and upon such request the commission shall provide, that any information which is the subject or part of the application remain confidential for a period of thirty days following notice of such determination. In the event that the reporting individual resigns his office and holds no other office subject to the jurisdiction of the commission, the information shall not be made public and shall be expunged in its entirety."

While there is nothing inherently problematic with these provisions, they are not mentioned in the sections that provide access to available documents. This creates the false impression that the records available on the website are comprehensive. Moreover the Review Group believes that the redaction of any information should be indicated when the redacted document, or the information taken for it, is accessed on the website. While it may reasonably appear to the Commission at a point in time that certain information is not material, circumstances can change. If redaction is noted, the user will have the opportunity to advise JCOPE what he or she is seeking and why and the redaction can be reviewed for potentially responsive information.

The website's Reportable Business Relationship pages are an example of this problem of lack of completeness. There are only eight records of reportable business relationships for lobbyists, and only fourteen for clients. Of the fourteen for clients, six are half-year filings for three entities. These numbers appear unreasonably low. The website discloses that the paper forms are scanned and posted as they are processed but there is no information about how many have been filed and remain to be processed.

The JCOPE website also fails to help the user obtain a comprehensive understanding of the lobbyists and legislators associated with an individual piece of legislation. This is primarily because it is not searchable, and therefore one cannot find all the information on the website related to a particular person or piece of legislation. There is no reason why this information could not be aggregated by JCOPE so that all the lobbying activity related to particular bills and subjects could be easily accessed, as could all lobbying directed to a particular person. As already noted, the Review Committee believes that if properly construed the law requires lobbying disclosure to indicate the person lobbied or to be lobbied where that information is known, and the subject matter about which each such person is lobbied. From 2007 to 2013, the overwhelming majority of lobbyist disclosures listed only the name of the governmental branches they expected to lobby.[105] As we have shown, JCOPE can and should change that.

c. Availability of Relevant Data

In the end a website designed to provide information about conflict of interest and special interest advocacy is no better than the quality of the information provided and the provision of all the information material to those topics. JCOPE fails to include certain relevant and material information in some cases because it is not available to any state agency, and in other cases because JCOPE has not placed relevant and material information on its website.

For example, while users can retrieve forms through the Lobbyist Filing Portal reporting how much compensation a lobbyist has received in any two month period in the case of all lobbyists over a $5,000 compensation level,[106] Article 1-A does not require the lobbyist to attribute that income either to particular persons lobbied or to particular topics of lobbying for a

[105] *See* Registered Lobbyist Disclosures 2007-2013 (as of 9-26-2013), *available at* http://www.jcope.ny.gov/datasets/JCOPE_LOBBYISTDISCLOSURE.xlsx. Notably, this information is formatted in such a way that users cannot use the "sort" function in Excel.

[106] N.Y. Legislative Law Art. 1-a, Sec. 1-h(a).

particular client. Thus there is no way to determine with accuracy through the lobbying reports how much money went to lobbying activity for any specific piece of legislation. Users also have no way of distinguishing between types of lobbying activities. For example, faxing a fact-sheet to legislators is not distinguishable from a one-on-one conversation over dinner.

This lack of concrete information about significant lobbying contacts related to legislation can be contrasted with the more detailed information about contacts with lobbyists concerning contract procurement and regulatory matters that is provided by the Product Sunlight database. The Legislature required the Executive Branch to establish this database of meetings, and required that it be in searchable form, in the same bill, Chapter 399 of the Laws of 2011, that established JCOPE.[107] The Project Sunlight database (www.projectsunlight.ny.gov) has useful features and will help JCOPE's enforcement because it contains disclosure of meetings with lobbyists generated within the State and can be used to identify lobbyists who have failed to register.

However, the Project Sunlight database lacks some important information because it does not require the reporting of meetings about legislation and does not require the reporting of meetings with persons in the Legislative Branch. Still, for purposes of creating a better picture

[107] Every state agency, department, division, office, and board; every public benefit corporation, public authority and commission at least one of whose members is appointed by the governor; the state university of New York and the city university of New York, including all their constituent units except community colleges of the state university of New York; and the independent institutions operating statutory or contract colleges on behalf of the state, shall cooperate with the office of general services and supply to that office on a schedule and in a format determined by the office of general services in consultation with such governmental bodies, a list of all individuals, firms, or other entities (other than state or local governmental agencies) who have appeared before such governmental body in a representative capacity on behalf of a client or customer for purposes of: (a) procuring a state contract for real property, goods or services for such client; (b) representing such client or customer in a proceeding relating to rate making; (c) representing such client in a regulatory matter; (d) representing such client or customer in a judicial or quasi-judicial proceeding; or (e) representing such client or customer in the adoption or repeal of a rule or regulation. The office of general services shall create forms upon which such information shall be supplied and a database which shall collect and systemize the collection of such information. The office of general services shall make the database available and accessible to members of the public on a webpage subject to statutory confidentiality restrictions, and shall ensure that the information contained in the database is readily searchable and available for download. The database shall be known as "project sunlight." Laws of 2011, Chap. 399, § 4.

of lobbying for procurement and rules and regulations having the force of law, it can be viewed together with bi-monthly lobbying reports. These documents provide a clearer picture of lobbying advocacy. Accordingly, the JCOPE website should at a minimum provide integrated searching with the data in the Project Sunlight database.

A particularly glaring omission from the JCOPE website is campaign contribution information. A common question is how much those who are the target of lobbying are receiving in contributions from those interests that have launched the lobbying campaign. For a public officer to ask, "what is in it for me" is no less a breach of public trust if what he or she has in mind is a campaign contribution, as opposed to a quid pro quo cash kickback for his or her legislative vote. That is the premise of *Buckley v. Valeo*.

In this regard the JCOPE website should be contrasted with the NYOpenGovernment website (www.NYOpenGovernment.com), which was established by the New York Attorney General. That website is a leap forward because it provides ready access to both lobbying and campaign contribution information and allows searches across both databases. However it is not linked to the Project Sunlight database, as it should be. It also does not provide information about the outside activities and financial interests of members of the Legislature or Executive Branch policy makers. In addition, it is subject to the limits of the completeness of lobbying information described above.

2. Recommendations

JCOPE should be in the forefront of the effort to provide easily accessible and comprehensive information about conflict of interest risks and lobbying activities. Together with the custodians of the Project Sunlight and NYOpenGovernment websites, JCOPE should convene a users' roundtable including representatives of the public media, government watchdog

groups and the public to discuss ways to consolidate and expand these public access efforts. Project Sunlight should be expanded to cover meetings concerning legislation and with members of the Legislature and their staff. The users' roundtable should discuss in what domain the expanded coverage should be located. Project Sunlight is housed in the Office of General Services in the Executive Branch. It may make sense for it to continue to be housed there but to be placed under the control of JCOPE, as the disclosure will cover meetings in the two branches of government that JCOPE uniquely regulates.

The expansion of Project Sunlight will require legislation. JCOPE should take the lead in proposing that legislation. This step will go far to show the public that JCOPE can act with true independence.

With regard to the coordinated disclosure of campaign contribution and lobbying information, JCOPE should work with the Attorney General to build on what that office has started. Unlike Project Sunlight where the information is captured and reported by state officials, this coordinated disclosure calls for more detailed reporting by lobbyists. This is therefore a topic that should be addressed in a roundtable of both users and filers, which JCOPE should convene. The roundtable should consider the need for amendments to Article 1-A of the Legislative Law to make the lobbying activity database adequate to the disclosure of lobbying activities affecting particular public officers, or the adoption or defeat of particular bills or legislative proposals. Again, JCOPE should take the lead in proposing needed changes to the Legislature and working for their adoption.

D. Self-Dealing

1. Analysis

The Moreland Commission Report illuminates the abuse and criminality that can be enabled by non-profit organizations sponsored, controlled, or staffed in part at the legislator's direction – nominally to provide community services, but in fact as the means to create no-show, seldom-show or overcompensated jobs, while delivering little in the way of actual services.

The report specifically cites four cases in which legislators were convicted of charges relating to theft or misappropriation of funds of non-profit organizations they established or controlled.[108]

The report also addresses the subject of "Member Items and Legislatively–Directed Funding Grants", noting "potential conflicts of interest and legislatively-directed discretionary funding grants."[109] (The report notes that its investigation into one cited organization is continuing.)

The Moreland Commission states that "[S]o-called 'member items' – legislative grants of discretionary funding that are not lined out in the State budget – have been used in some of the most egregious corruption schemes by corrupt officials who funnel state money to those who line the official's pockets", and " recommends "greater transparency so that the public will know which legislators are sponsoring what public projects."[110] We adopt that recommendation and ask that JCOPE do so as well, by taking affirmative and low-to-no-cost actions within its existing authority. While the Moreland Commission notes several corrective and preventative actions taken by the governor and state agencies[111], including the Governor's commendable decision to disapprove member items, his action did not de-fund all organizations receiving legislative grants. We believe that JCOPE can play a useful role in helping to implement these reforms on a

[108] Moreland Commission, Prelim. Report, pp. 4, 19 (Dec. 2, 2013).
[109] *Id*. at 9.
[110] *Id.* at 10.
[111] *Id.* at 21.

permanent and broader basis. Section 17 of the law governing JCOPE gives it explicit authority to "[p]romulgate rules concerning restrictions on the outside activities. . . of persons subject to its jurisdiction." The Review Group is of the opinion that legislators are persons subject to the jurisdiction of the Commission within the meaning of this provision because it is the outside activities or legislators that are particularly intended to be regulated. JCOPE can therefore use that power to promulgate rules that bar outside activity that creates an appearance of impropriety through self-dealing.

The need for a prophylactic rule addressing appearances is clear because the actual facts may be hard to establish. We note especially the finding by the Moreland Commission that ". . . in some cases, the legislative sponsor of a particular member item or other legislatively-directed capital funding was not always identifiable through publicly available documents. . . in some cases, it has proven impossible for the Commission to identify the legislator or legislators at whose discretion member items or other legislatively-directed capital funding was disbursed. Not only do sponsors regularly fail to identify themselves on member initiative forms, but at times, a legislator will swap out his or her own name for the name of another legislator who actually has no connection to the funding."[112]

2. Recommendations

We make the following recommendations:

Publicize Legislator Associations With State-Funded Not-For-Profit Organizations

We call upon JCOPE to publish and maintain a list of the not-for-profit organizations funded by the legislature. The list should:

- set forth the amount of money paid to the organization by the legislature

[112] Moreland Commission, Prelim. Report, p. 22 (Dec. 2, 2013).

- identify the name(s) of the legislators who sponsored the appropriation
- cross reference the names of the legislators and the organizations on the JCOPE website
- state whether any legislator is associated with the organization in an official capacity, such as a consultant, trustee, director or officer

Prohibit Legislators, Their Staffs and Their Immediate Families From Holding Office in, being Employed by, or Recommending Persons to be Hired by State-Funded Not-For-Profit Organizations

We believe that it is an inherent conflict of interest for a legislator to serve in a paid or unpaid position with an organization receiving state funding. There may be situations where that conflict could be safely waived, as for example to allow a legislator to teach a course at a university that receives state funding, but those waivers should be considered in a transparent way by JCOPE with the burden on the person seeking the waiver to demonstrate absolute propriety. We further believe that it creates an appearance of impropriety for a member of the Legislature to recommend the hiring of a particular person in a state-funded not-for-profit organization. As noted above, JCOPE has the power to promulgate a rule banning these outside activities. We recommend that they do so because of the appearance they create of a breach of public trust in violation of subdivision h of the State Code of Ethics.

Prohibit Legislators, Their Staffs and Their Immediate Families From Engaging in Certain Business Dealings with State-Funded Not-For-Profit Organizations

We believe it is also a conflict of interest for a legislator, staff member or immediate family member of either to engage in a business transaction with a state-funded not-for-profit organization other than as a member of the group to which the not-for-profit was created to provide services. We urge JCOPE to issue guidance about what kinds of business dealings should be prohibited outside activity. Such prohibited acts would include selling services to a

state-funded organization. A legislator could evade the prohibition against holding office by being a paid outside advisor or vendor to the organization.

E. Training

Reflecting the importance training plays in bringing about ethical behavior, Chapter 399 of the Laws of 2011 added statutory requirements regarding ethics and lobbyist training. All public officials who are required to file financial disclosure forms are required to take a two hour comprehensive ethics course designed and administered by JCOPE. The course is to cover all laws of relevance to the ethical behavior of those in public service. It must be taken within two years of appointment, however within three months of appointment such persons must complete an online ethics orientation course. In addition, once every three years following the completion of the comprehensive training course, covered public officials must complete a 90 minute ethics seminar developed and administered by JCOPE. Members and employees of the Legislature may meet this requirement by taking training courses designed by the LEC provided the legislative training program meets or exceeds the above described requirements. Whether that is in fact the case is a subject this Report does not address because the Review Group has not reviewed the activities of the LEC. It intends to do so in the future but believes that a clear focus on JCOPE was the best place to start.

On the lobbyist side, Chapter 399 added a new training requirement for lobbyists. Once every three years registered lobbyists are required to take an online ethics training course developed by JCOPE that must include explanations and discussions of New York statutes relating to ethics in the Public Officers Law, the Election Law and the Legislative Law. This new mandatory training is significant in part because it recognizes that the Election Law concerns ethics and requires JCOPE to provide instruction about the ethical components of the

Election Law. The law also requires instruction as to the "underlying purposes and principles of the relevant laws." JCOPE has not yet made available the curriculum it will use to implement this training requirement.

1. Analysis

JCOPE's current Comprehensive Ethics Training Course is a good start but could be significantly improved.

The 2013 Comprehensive Ethics Training Course is a 102-page presentation used to satisfy JCOPE's training requirement. While a training seminar is time-limited by law to two hours, and the 102-page length is probably an adequate size for practical reasons, the materials do not adequately explain the purposes of ethical requirements, the reasons why conflict of interest must be judged under an appearance standard and the serious consequences that can befall a state employee who acts while burdened with a conflict of interest. The 102 page power-point presentation and hand-out slides thus do not capture all of the training materials that public officials and employees need in order to fully understand the ethics laws and the potential consequences that follow them. It is more of the start on an ethics laws handbook than a fully effective vehicle to promote compliance.

JCOPE's training materials must contain more robust guidance not only about what the laws are, but also about why public officials and employees must abide by those laws. Only two pages are devoted to this topic and one consists entirely of a dense quote from the message that President John Kennedy sent to Congress in 1961 proposing conflict of interest legislation. Since the tone for ethics compliance is set from the top, far more useful would be strong statements from the Governor and the Legislative leaders. Committing themselves in this way to

ethical conduct in an ethics training course would also serve to help them recognize their obligation to lead from the top by example in matters of ethics.

Currently, the Training Course does not provide a comprehensive publication or source for supplemental materials. The Training Course directs trainees to the JCOPE website for fuller laws, advisory opinions, policies and guidance documents. While there is a quite basic guidance document for the lobbying law, the only guidance for ethics compliance is the interim guidance on gifts. There is a purported "handbook" that is not in fact a real handbook but rather a 104-page document setting out in unsearchable format the laws JCOPE administers. This statutory text is duplicated elsewhere on the website.

2. Recommendations

If JCOPE is going to rely on its website to supply supplemental training and informational material, which is reasonable, we urge it to construct a dedicated page in the style of a real handbook containing easily-searchable training-oriented materials so that public officials and employees with ethics questions can find answers quickly and easily. JCOPE has in development the online training course required by Chapter 399 but the true handbook we have in mind would be a comprehensive supplement to online training. The primary focus of online training should be the reasons behind JCOPE's low tolerance for anything less than full compliance.

Certain portions of the ethics laws also receive too little attention in the training materials. For instance, as noted above in the enforcement section, we feel that paragraphs 3(f) and 3(h) of the Code of Ethics (Public Officers Law § 74) demand greater emphasis and more accurate guidance. In the Training Course, these two paragraphs combined receive only two sentences of treatment, suggesting a lack of importance as well as a lack of significant consequence if violated.

They also lack the examples and hypotheticals that other paragraphs of the Code of Ethics receive. Because we feel that the duties and responsibilities under paragraphs 3(f) and 3(h) are vital to the ethical culture in state government, we urge the Commission to devote greater attention to them in these materials.

In particular there need to be examples and ethical guidance on the conflict of interest issues that arise when public officials deal with persons or companies that have made large campaign contributions to their campaign, the elected official for whom they serve as staff or the elected official by whose authority they hold a policy making position. In specifying in Chapter 399 that the ethics training JCOPE provides to lobbyists must include training on the Election Law, the Legislature has recognized that campaign finance has important ethical dimensions. Indeed, large contributions are such an obvious source of conflict of interest that their connection to ethics rules cannot be seriously debated. In the opinion of the Review Group the guidance needs to state clearly that creating an appearance that special access has been granted in exchange for a campaign contribution is a violation of sections 3(d) and 3(f) of the Code of Ethics[113] and that the proper course is to avoid such an appearance by not granting special access to either the lobbyist for a large contributor or his client that might reasonably be tied to a large campaign contribution. The access will not be special, for example, if it is granted equally to all sides of the issue.

[113] N.Y. Public Officers Law Sec. 74(3)(d): "No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes."
N.Y. Public Officers Law Sec. 74(3)(f): "An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person."

The Commission also should be more expansive generally in explaining the various ethics laws through guidance, FAQs, hypotheticals, and examples, including any relevant rulings or advisory opinions. Currently, the Training Course directs trainees to "JCOPE's regulations, advisory opinions, and policies" (which are not linked in the "Training" section of the JCOPE website) for further guidance on the ethics laws. As noted above, the materials available on the website are either incomplete or scattered, so this direction is of little practical aid to anyone seeking further guidance. While the presentation itself is limited by time, the website is not, and JCOPE should make clear and abundant explanation of the various laws a primary and easily-searched component of the online Training library.

We also urge the Commission to move beyond the mere mechanics of the ethics laws in these trainings. While it is important to educate public officers and employees on what the laws are and how they can be followed or violated, equally as important is *why* the laws exist and *why* it is so vital that people at all levels of state government take their ethical responsibilities seriously. This element of purpose and importance should pervade throughout the training alongside the mechanical explanation of what the law is and how it is to be followed.

Finally, the Review Group also believes that the Commission has the authority to be in effect an advocate for ethical government. Just as police departments and governmental agencies proactively endeavor to educate the public about drunk driving to reduce violations preventatively, even while also enforcing drunk driving laws when violated, so too should JCOPE be proactive in trying to cultivate an ethical government even as it enforces ethics laws in response to violations. The training seminars are intended achieve this to a degree. But a champion for ethics in Albany is badly needed, and we believe that JCOPE can and should play that role. This goes beyond mere training seminars, and should develop into a multi-faceted

campaign to make ethics awareness a regular and visible part of State Government for elected officials and employees alike.

Visibility is critical for cultivating a culture of high ethical conduct. We urge the Commission to pursue a regular and visible campaign to make ethics a part of the State Government culture. As noted above, the State's leadership should be enlisted in creating strong ethical messages from the top. Sending regular ethics-oriented emails to government officials and employees that include elements of training (perhaps a "rule of the week" with examples and answers to frequently asked questions) as well as news (recent JCOPE actions, ethical behavior worthy of recognition, or similar items of note) would do much to maintain a conscious awareness on the part of public officials and employees of their ethical duties.

Workplace signage would also be a boon to the ethics effort. Large, highly-visible reminders with easily read and remembered slogans or messages hung in government offices and agencies would provide daily reminders that officials and employees carry a public trust and an ethical duty not to betray that trust. They could also be used to warn of the serious consequences that ethical lapses can and do carry. Greater awareness of the consequences of violating ethics laws can be a powerful tool in deterring unethical behavior.

We also urge the Commission to be assertive in expecting top government leaders and agency heads to contribute to ethics training materials and ethics-oriented media. An ethical culture must be endorsed from the top down, and participation by leaders not only creates an element of ethical accountability, but also conveys an internal motivation for ethical behavior as distinct from an outside imposition of ethical mandates.

Finally, one of the Commission's most important roles in this aspect is to enable the perception that Albany has made ethics a priority. JCOPE must take the lead in establishing

guidelines regarding the ethical behavior of public officers who have received, or whose appointing authorities have received, large campaign contributions from persons or entities seeking to influence them through subsequent lobbying.

Ethical training in state government cannot simply be a mechanical exercise in teaching what the ethics laws are and how their violation can be punished. In order to cultivate a culture of ethics in government, JCOPE must take a proactive lead in wielding its authority and trying to shape the agencies and government branches subject to it. We urge the Commission to embrace this role with gusto.

F. Composition of Commission

JCOPE's first two years of existence show the persistence of a basic flaw in its structure that prevents it from operating at full capacity with an independence not open to reasonable question. From the outset, government watchdogs and the media expressed skepticism about JCOPE's independence in light of the fact that its appointment structure reflects partisan considerations and a problematic power dynamic between the legislature and governor's office. As the New York Times opined in June 2011, "the new 14-member Joint Commission on Public Ethics created to monitor elected officials, legislators and lobbyists is so deeply flawed in its structure as to be wholly ineffective."[114] The initial skepticism about JCOPE's ability to be independent does not appear to have abated and there is no objective reason to think it should have. Therefore, on the current trajectory there is no reason to suppose that JCOPE will be able to restore public confidence in government.

1. Analysis

[114] *Ethics Reform, Albany Style*, N.Y. TIMES, June 6, 2011.

JCOPE must be more of an activist. Its major enforcement action was truncated in its reach. It must show the energy and boldness required to address the weaknesses of the culture for ethical behavior in State Government.

It is also the Review Group's judgment that public skepticism is not likely to abate in the future without a sharp increase in the robustness of JCOPE's performance. We also believe that an increase in robustness, while highly desirable, will not be sufficient under the circumstances. In order for JCOPE to fulfill its mission of restoring and maintaining public confidence in New York State Government and the integrity of the law making and procurement processes in Albany, it is necessary to correct the flaws in JCOPE's structure.

Under Executive Law § 94, the majority leaders of the Assembly and the Senate each appoint three commissioners; the minority leaders of the Assembly and the Senate each appoint one commissioner; and the governor and lieutenant governor appoint six commissioners, three of which must be long to a major party that is not the governor's party.[115] The law also requires vacancies to be filled along party lines.[116] As already discussed, certain enforcement actions can be vetoed on a party basis. The Executive Director is appointed by a majority vote which must include at least one member appointed by the Governor from each of the two major political parties and one member appointed by a legislative leader from each of the two major political parties.

The assumption of this appointment structure appears to be that seven members of the Commission will be Democrats and seven members will be Republicans. However it is

[115] *See* N.Y. Executive Law Sec. 94(2).

[116] "In the event that a vacancy arises with respect to a member of the commission first appointed … by a legislative leader, the legislative leaders of the same political party in the same house shall appoint a member to fill such vacancy… In the event of a vacancy in a position previously appointed by the governor and lieutenant governor, the governor and lieutenant governor shall appoint a member of the same political party as the member that vacated that position." *Id.*

theoretically possible for minor party or independent members to be appointed except in one instance. That instance is the mandate that the Governor appoint not merely three members who do not belong to his party but three who belong to the other major political party. This provision on its face discriminates against persons who are not members of any political party or are members of a minor political party.

There is a reasonable question whether this discrimination is narrowly tailored to serve a compelling state interest and therefore constitutional under the First and Fourteenth Amendments.[117] The de facto split of the Commission into seven Democrats and seven Republicans is also constitutionally problematic because the constitutional analysis here must take account of realities and not just the theoretical possibilities.[118] The practical reality is that under the current structure independents and minor party members are precluded from participation in the vital activity of administering and enforcing ethics and lobbying laws.

Moreover, the 50 – 50 party structure is something to be avoided as a matter of policy in an ethics enforcement agency. It bespeaks a partisan focus that has no place in government ethics oversight.

This is so for several reasons. First, independence, not party membership or loyalty, should guide government oversight. JCOPE's organizational structure should facilitate fair scrutiny of elected officials; it should not reflect a political truce to avoid embarrassment to

[117] By "giv[ing] the two old, established parties a decided advantage over any new parties struggling for existence," the state "place[s] substantially unequal burdens on … the right to associate," which can only be justified by a compelling state interest. Williams v. Rhodes, 393 U.S. 23, 31(1968) (striking down ballot-access provision that effectively excluded new parties from qualifying for the ballot). Although a state may have a valid interest in promoting a two-party system to encourage compromise and political stability, this interest is not so compelling as to justify as system that "does not merely favor a 'two-party system'; it favors to particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly." *Id.* at 32. While *Williams* addressed the issue in the context of election law, the principle of equal political opportunity under the First and Fourteenth amendment extends broadly to participation in the political process.

[118] *Id.* at 31.

either party. When such a political truce reigns, it improperly prioritizes the interests of entrenched political parties over the public's interest in securing ethical government.

Second, the 50-50 structure creates the appearance of weak enforcement and the primacy of the principle that no party will be embarrassed. Since in order to maintain public confidence in government ethics laws are based on the standard of appearances, the structure of JCOPE needs to be judged by the same standard.

Third, others have remarked on the weakness of a 50 – 50 structure in a context where it is far more defensible than it is for JCOPE. The Moreland Commission, in its Preliminary Report, identifies the partisan structure of the Board of Elections as among the primary causes of the Board's deficiencies. The "party divide" was found to limit the flow of information within the agency, breed hostility and undermine cooperation among Board of Elections employees, and "often ensur[e] that the [enforcement] Unit engages in little or no enforcement."[119] The partisan concerns underlying the Board's structure pervade the Board's decision-making, as is clear from the Board's troubling determination that "the value of protecting against possible political vendettas outweigh[s] the cost of not addressing potentially meritorious anonymous complaints … regardless of the severity of the allegations involved or the quality of the information provided by the anonymous complainant."[120] Thus, the Moreland Commission concluded that "the Board's chronic, willful inaction, and anti-enforcement policies and practices, are rooted in the Board's party-driven structure," and that "[f]or the Board, bipartisanship means a tacit agreement among the parties to do nothing to enforce our laws."[121].

Therefore, if there is another way to prevent partisan abuse of the Commission's authority that does not have the practical effect of excluding independents and minor party

[119] Moreland Commission, Prelim. Report, pp. 61–62 (Dec. 2, 2013).
[120] Moreland Commission, Prelim. Report, p. 72 (Dec. 2, 2013).
[121] *Id.* at p. 85.

members, or perpetuating a 50 – 50 major party control of JCOPE, following that alternative would serve both constitutional and ethics policy values.

2. Recommendations

Unless the Legislature and the Governor are willing to reconsider earlier proposals for an appointment commission like that used to select judges of New York's highest court, which is the ideal approach, we propose urgently needed improvement by eliminating the political test for appointments to JCOPE, and revising the Commission's structure and appointments as follows. The majority leaders of the Senate and Assembly should each appoint two, rather than three, commissioners. The minority leaders of the Senate and Assembly should each appoint one commissioner. The Governor and Lieutenant Governor should appoint four, rather than six, qualified commissioners irrespective of political allegiance. The Attorney General and the Comptroller, who currently make nonbinding recommendations for appointees to the governor, should each appoint one commissioner. An additional commission seat should be added for an appointment by the Chief Judge of the State of New York.[122]

This appointment scheme would meet concerns about abuse of JCOPE as a tool for partisan infighting, while increasing the Commission's independence in appearance and fact. It would reduce the representation disparity between majority and minority legislative leaders, eliminate the party-based requirements for the Governor's appointees, and provide for

[122] This requirement is in accordance with the separation of powers under New York's Constitution. *See* Rosenthal v. McGoldrick, 280 N.Y. 11 (Ct. App. N.Y. 1939) ("'The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers.' The rule that the judiciary may not be charged with administrative functions does not apply when such functions are 'reasonably incidental to the performance of judicial duties.'") (quoting Matter of Richardson, 247 N.Y. 401 (Ct. App. N.Y. 1928), opinion by Cardozo, Ch. J.). It is a judicial duty to interpret and enforce the laws of the state of New York, including the laws governing the procedures to be followed in judicial proceedings, and it is reasonably incidental to that duty for the Chief Judge to make an appointment to a body that oversees the ethics of those who write these laws so that the laws generally, and the procedural laws in particular, may more clearly be said to do justice and not be tainted be conflict of interest.

appointments by the Attorney General, Comptroller, and Chief Judge of the State of New York—the State's chief legal officer, its chief audit officer and its chief judicial officer. As a result, the Commission's structure would no longer reflect a partisan truce that facilitates giving priority to protecting the image of both major parties. Instead, it would strike a balance of perspectives from the legislative, executive, and judicial branches of government, and provide for non-partisan appointments by diverse elected officials and the Chief Judge. This structure is one reasonably designed to avoid political abuse and facilitate effective, professional and independent government ethics oversight.

IV. CONCLUSION

The Review Group believes that the two most important conclusions to draw from this Report are first, that JCOPE has not yet made the contribution it can to its vital mission of restoring public confidence in government largely due to lack of a vigor sufficient to overcome public skepticism, and second, that any reasonable attack on the conflict of interest in State Government cannot ignore the conflicts of interest created by large campaign contributions and that it within the mandate of JCOPE to address this key source of conflict of interest.

As to the first point, JCOPE did not show leadership, assertiveness and initiative when not fully pursuing the Lopez investigation. Thus, JCOPE did not meet the challenge of showing that its appointment and decision making structure will not impair its independence in fact and appearance.

As to the second point, even if restructured and reinvigorated in the ways we have suggested above, JCOPE must provide an inoculation against the perception that Albany is under the influence of large campaign contributions by establishing guidelines for the ethical behavior of a public official who has received, or whose appointing authority has received, a large

campaign contribution from a person or entity now seeking to influence his or her decision through lobbying activity. As noted above we believe that in the case of a large contribution, the public officer should decline to grant any special access to the lobbyist or his or her client.

We recognize that the remedies we are recommending constitute strong medicine. However the breach of public trust that now besets State Government requires strong medicine. It is always important to recognize the many persons of the highest integrity and commitment to public service who work in State Government. It is for their sakes as well as the public's that the seemingly unending trail of indicted and convicted legislators must end. As noted above, the Review Group, and the organizations with which it is affiliated, stand ready to help JCOPE in this task. We want to make our Hope for JCOPE a reality.

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CITIZENS UNION
POSITION STATEMENT AND RECOMMENDATIONS
REGARDING VOTING PROCEDURES AND DISCLOSURE OF
JOINT COMMISSION ON PUBLIC ETHICS (JCOPE) DELIBERATIONS
MAY 2013

The Public Integrity Reform Act (PIRA) was signed into law by Governor Andrew Cuomo on August 15, 2011 with broad support in both the Assembly led by Speaker Sheldon Silver and the Senate led by Senator Dean Skelos. It instituted landmark reforms concerning ethics oversight and enforcement in state government that resulted in the creation of the first ever external panel authorized to oversee legislative ethics.

OVERVIEW and ANALYSIS

The establishment of the new ethics commission, the Joint Commission on Public Ethics (JCOPE), was hailed as an important step forward, providing greater oversight of ethical misconduct through a more independent commission, increased disclosure of lobbying activity and business relationships of public officials, and the forfeiture of pensions for future state elected officials and employees convicted of felonies related to their public office. Citizens Union over the past ten years offered incisive policy research and proposals that shaped the development of the legislation, and strongly supported the enactment of the PIRA, acknowledging that it reflected politically necessary compromises to achieve desired outcomes.

The recent scandal in Albany involving the Assembly's handling of sexual harassment by Assemblymember Vito Lopez showed that a more independent ethics watchdog for the first time ever successfully passed judgment on a sitting legislator and found serious fault and violation of law that led to his resignation. JCOPE's investigation of Lopez, detailed in its well documented report, also brought to public light important facts about the Assembly's internal handling of an ethics matter involving a legislator. The law and the process worked – up to a point.

Although demonstrating the value of a more independent watchdog for policing misconduct in Albany, this important test case also illustrates the deficiencies in the law regarding JCOPE's voting procedures and the need for additional transparency of its operations.

Citizens Union has concerns with the current voting structure of the 14-member JCOPE, which allows a minority of 3 votes, if they are representatives of the same party and branch of government as the person investigated, to block an investigation from moving forward (first stage) or the issuance of findings that there is a substantial basis to believe that violations have occurred (second stage).

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Though JCOPE provided a full, public accounting of the facts of Lopez's harassment and misconduct, and the Assembly's mishandling of the matter, we do not know if a vote to launch a specific investigation into whether other members of the Assembly or Assembly staff violated applicable laws was considered and failed, or not considered at all. However in reviewing the report and public statements made by various individuals including both JCOPE executive director Ellen Biben and Speaker Silver, it appears that JCOPE did not choose to investigate the Speaker or his staff's handling of the confidential settlement in the sexual harassment matter involving Lopez with the intent to assess whether there were violations of law by anyone other than Lopez. Citizens Union's critique that no assessment took place does not mean that we necessarily think a violation occurred but that the Assembly's handling of the matter should have been specifically reviewed to evaluate whether were violations of the public officers law by members or staff of the Assembly besides Lopez.

As there is no public disclosure of votes, the public cannot know whether JCOPE considered investigating any other subjects besides Lopez for violations of the public officers law. And that is a problem that needs to be fixed if the public is to have confidence in the independence of strong and needed ethics enforcement.

Citizens Union's four recommendations to address the deficiencies in the law are below, both concerning JCOPE's voting procedures, and the need for additional transparency of its operations.

RECOMMENDATIONS

REFORM JCOPE'S VOTING PROCEDURES

1. **Citizens Union supports eliminating the provision allowing three members of the same party and branch as the person being investigated to block an investigation or the issue findings. Instead, Citizens Union supports changing the voting structure to allow a supermajority of 9 of 14 members to approve an investigation or issue findings.**

   Given that, by law, JCOPE is composed of 7 members from each of the two major parties, this means that the votes of at least two members of the same party as the person being charged would be required in order for an action to move forward. Currently 8 of 14 members must approve, but because the law requires that when an investigation deals with a member or employee of the legislature at least half of the JCOPE commissioners appointed by the legislative leaders who belong to that member's or employee's party must also approve. As a result, three members can block those actions even if the other eleven (including the other four members from the party of the person being investigated) approve.

This change in JCOPE's voting rule would require legislative action. It should be noted that for legislators and legislative employees, the Legislative Ethics Commission (LEC) is the final arbiter regarding penalties, so should the LEC believe that a JCOPE report -- which can only require the LEC to consider its findings and cannot require it to act regarding a legislator or legislative staffer -- is unfair or politically motivated, it has the opportunity to disagree with JCOPE's assessment.

INCREASE TRANSPARENCY OF JCOPE'S OPERATIONS

2. **If the current voting structure remains in place, when a majority of 9 or more members of JCOPE votes to proceed with an investigation or to make a finding, but it is blocked because 3 members of the same party and branch as the person being investigated vote to stop an investigation from proceeding, JCOPE should disclose the vote tally and whether a full investigation was launched or a report issued. In so doing, the fact that a minority blocked the investigation or issuance of a report within seven days of taking the vote would be revealed.**

   JCOPE would not be required to disclose the names of the commissioners casting votes, only the aggregate vote. JCOPE's annual report also should note instances in which investigations were blocked by a minority of votes. The name of the person who was the subject of the vote would not be disclosed.

   These changes would require legislative action.

3. **When JCOPE approves issuing a substantial basis report, the vote tally should be made public within seven days of the vote, including the name of the person who is the subject of the report.** Under current law, if a substantial basis for a violation is found, the name of the subject is eventually disclosed to the public. This may occur as early as 45 days after the issuance of the report, though the legislature can request an extension for its review, which would result in a delay of another 45 days before disclosure to the public. This would require legislative action.

4. **JCOPE's annual report should include greater information regarding each case (identified by number only) in the annual report** that the commission is required to produce. Specifically, JCOPE's annual report should include the following:

   a. **The tally and result of each commission's vote to initiate a substantial basis investigation, excluding the name of the person who is the subject of an investigation;**

   b. **The tally of each commission's vote and result regarding whether there is a substantial basis for determining that a violation occurred along with the name of the person who is the subject of the investigation; and**

   c. Along with the status of the complaint (now required), **the category of time that the investigation has taken to date (3 months, 6 months, more than one year, etc) or that was required for completion** before a vote on issuing a substantial basis report occurred.

Citizens Union Positions on New York State Ethics Reform

Adopted March 2015

Presented herein is a list of position recommendations adopted by the Citizens Union and Citizens Union Foundation Boards of Directors on March 6, 2015. The recommendations were put forward by the State Affairs Committee – led by Alan Rothstein and supported by CU policy staff members Rachael Fauss and Peggy Farber – which, as you know, has met several times over the past six weeks to address the increasing number of ethics reform issues that have moved to center stage as a result of the arrest of former Assembly Speaker Sheldon Silver and reform proposals put forward by Governor Andrew Cuomo.

These positions were shaped by the deliberations of the CU's Working Group on State Legislative Reform led by CU member Penny Christophorou and were informed by the research and analysis of her pro bono legal team at Cleary Gottlieb Steen & Hamilton LLC.

The New York State Legislature is the closest branch of state government to New Yorkers. We deserve a legislature whose members operate ethically, without conflict, and in the public interest. Legislators also need to be more empowered and allowed to act without needing to curry favor or fear retaliation. Legislative rules need to be overhauled to enable individual legislators' greater control over their roles and authority.

There are many ways to reduce corruption in Albany. Among them is a better-compensated legislature whose members don't feel the need to make outside income in order to make ends meet. Outside employment activities need to be fully disclosed to ensure that the veil of secrecy that has been used to cloak sources and amounts of outside income no longer exist. A too modest salary that hasn't been increased in 16 years has likely encouraged lawmakers to pad their per diem requests and provided opportunities of temptation to seek additional income through unethical or illegal means.

Strengthening our ethics laws and enforcement is critically needed, but so too is overhauling the way legislators are compensated and how the legislature is run.

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I. NEW POSITIONS

A. PERSONAL USE OF CAMPAIGN FUNDS

1. **Impose clear and strict limits** on the personal use of campaign funds.

2. **Support Governor Cuomo's proposed amendment** of the New York election law to impose limits on the personal use of campaign funds as far as the governor's proposal goes, but impose certain additional limits. (See attached Appendix for a list of uses that would be prohibited under the governor's bill.)

3. **Support additional limits** on the personal use of campaign funds, specifically:

   a. **Prohibit elected officials from using campaign funds to pay attorneys' fees and costs of defending against civil and criminal investigations or prosecutions alleging violations of state or federal law**, unless the expenditure is exclusively related to the candidate's campaign.

   b. **Define *all* household expenditures as "personal use" expenditures even if a portion of a household is used for campaign activities, and define *all* clothing purchases as "personal use" expenditures, including clothing used in the campaign**. The governor adopted the federal election law's definition of "personal use" expenditures, but for this element.

B. DISCLOSURE OF OUTSIDE INCOME

1. **Require the disclosure of *all* sources of outside income.**[1]

   a. **Support Governor Cuomo's proposal but with additional disclosures.** The governor's bill **would require public officials** who provide services to individuals or entities, or who work as members or employees of firms that provide such services, **to disclose the identity of all clients paying fees greater than $5,000 to whom the official personally provided services, and to describe services actually provided.**

   b. **Require additional disclosures.**

      i. **Require public officials who work as members or employees of firms to disclose the identity of all firm clients seeking state action, whether or not the legislator has personally provided service**, and **describe the services actually provided on matters related to state action.**

      ii. **Lower the triggering fee amount** from $5,000 **to $2,500.**

[1] Retaining exceptions for matters related to domestic relations, etc., already delineated in the disclosure law.

iii. **Require the state to release the disclosures to the public in an electronic format permitting independent analysis.**

C. **PER DIEM PAYMENTS**

1. **Continue the per diem system but only if a system is established that requires legislators to verify their presence in Albany** on days for which they claim per diem payments, and present verification in such a way as to be viewed easily by the public.

2. Citizens Union does not support Governor Cuomo's proposed per diem reform, which effectively replaces per diems with a reimbursement system by requiring lawmakers to submit receipts and other documents in exchange for payment. Reimbursement systems are cumbersome and impose high administrative costs on government resources.

D. **COMPENSATION**

1. **Income earned by legislators from outside activities should be subject to a cap.** A cap on outside income **provides the clearest and most easily enforced way to combat the kind of conflict of interest that arises when lawmakers earn income from sources other than their public salaries.**

   The majority of New York State legislators do not earn outside income, and only a small portion earn more than $20,000 from outside income. Citizens Union does not endorse a specific cap on outside income. We note that members of Congress are subject to a 15% cap on outside income, but members of Congress also receive a much higher salary and have received a more recent pay increase. Depending on both the new legislative salary and the range of prohibited outside income sources, an outside pay cap as high as 25% or more could be acceptable depending upon other considered factors.

   New Yorkers need a legislature that is fairly compensated. It has been sixteen years since New York lawmakers received a pay increase, and during that time, the cost of living has risen 40 percent. A cap on outside income, therefore, must be part of a package that includes both a significant salary increase and a mechanism – such as a compensation commission – for determining salaries in light of increases in the cost of living. New York State leads the nation as a center of economic activity and remains an incubator for new social policies that requires a legislature that can handle complex and time-consuming matters. The demands of serving effectively and productively in New York preclude most legislators from earning significant income from outside activities which is why compensation needs to be improved for state legislators.

2. **Grant members of the New York State legislature a significant increase in their base salary.**

3. **Bar legislators from receiving compensation, directly or indirectly, for referring any client or customer who is lobbying or advocating on behalf of any pending state legislation or any other favorable state action to any entity with which the member has a business relationship.**

4. Subject the governor and statewide elected officials to these proposed compensation reforms.

E. **A QUADRENNIAL COMPENSATION COMMISSION**

1. Citizens Union already supports the establishment of a compensation commission (outlined in a section below) that creates a more politically representative appointed body than the commission the governor proposes.

2. **Citizens Union does not support Governor Cuomo's proposal of a compensation commission consisting of three commissioners** – the chair to be appointed by the governor, and the two others to be appointed by the leader of each chamber.

3. **Citizens Union does not support the governor's proposal**, contained in his compensation commission bill, **of a two-tiered level of pay, one tier for lawmakers who agree to forego outside income, and the other, lower, tier for those who elect to receive outside income.** Instead, Citizens Union should support a cap on outside income as recommended above.

F. **ETHICS ENFORCEMENT**

1. Strengthen the jurisdiction of the Joint Commission on Public Ethics (JCOPE) and change its governance structure.

   a. Citizens Union has already called for reform of JCOPE's voting structure and its reporting protocols. (Our existing position on JCOPE reform is outlined below.)

   b. **Grant JCOPE complete jurisdiction to hold enforcement hearings and to make findings of fact and conclusions of law**. This is necessary for transparency: LEC hearings are conducted in private; JCOPE hearings are public hearings. The legislature would retain authority to determine penalties of its members and staff.

   c. **Reevaluate the financial disclosure statement form** to make sure it elicits meaningful information, **and assess the applicability of the filing requirements to those who are mandated to file solely on account of their income** and not because they hold policy-making positions. This will ensure that JCOPE is able to better focus on those filers who have a greater risk of conflicts of interest.

   d. **Increase JCOPE's budget from its current $4.5 million** and provide independent budgeting by linking JCOPE appropriations to the appropriations of another state agency or public entity so that legislators, who are regulated by JCOPE, cannot target JCOPE for budget cuts as a means of affecting JCOPE's performance of its duties.

   e. **Require public officials to file all financial disclosure statements electronically.**

G. **LIMITED LIABILITY COROPORATIONS (LLC) LOOPHOLE**

1. **Add to the governor's proposed reform of the LLC loophole by advancing CU's existing position in strengthening the proposal.**

   a. The governor proposes treating an LLC as a corporation for the purposes of campaign contribution limits.

b. **Citizens Union's existing position encompasses the governor's proposal and adds that in the absence of an agreement to the contrary, LLCs, together with a common managing member should be considered a single source for the purposes of campaign contribution limits.**

H. LUMP SUM FUNDS

1. **Support the governor's proposed standards for legislators who seek to award contracts and grants from lump sum appropriations.** That is, require:

   a. **an affirmation by the lawmaker** to the director of the Division of the Budget **that the contract or grant is for a lawful, public purpose, and that the lawmaker has not and will not receive any financial benefit**, and that there are no conflicts of interest (including for family members, staff, etc.); and

   b. **compliance with all financial disclosure requirements** of section 73-a of the public officers law.

2. **Expand the governor's proposal to apply to *all* state elected officials involved in determining grants, including the governor; and *all* lump sum funds authorized in the budget.** It appears that 15 lump sum pots in the proposed FY 2016 were covered by the new requirements. Citizens Union has identified at least 66 pots in the current budget, 12 of which were covered by the requirements (note: 3 additional items were covered that were not initially found by Citizens Union, as they do not identify an elected official as responsible for their distribution). **This should be further codified in state finance law to ensure application to all future lump sum pots.**

II. EXISTING CU POSITIONS [PROVIDED FOR INFORMATION AND CONTEXT]

A. GOVERNOR'S USE OF APPROPRIATIONS BILLS TO ACHIEVE REFORM

1. While supporting many of the governor's proposed reforms, Citizens Union does not support the governor's use of the budget appropriations process to achieve reform as it . CU does support including reform measures in Article VII authorization bills that accompany the budget, as the legislature can amend those bills.

B. JCOPE REFORM

1. **Citizens Union supports eliminating the ability of three commissioners of the same party and same branch as a person being investigated to block an investigation and/or issue of findings.** We also calls for more robust reporting of JCOPE's vote tallies. Specifically, our May 2013 recommendations seek:

   a. a requirement, assuming that the three-person veto remains, that JCOPE disclose the vote tally whenever a minority of three blocked an investigation or report;

   b. a requirement that JCOPE make a vote tally and the name of a subject public within seven days of a decision to issue a substantial basis report, rather than 45 days; and

c. a requirement that JCOPE broaden the scope of its reporting in its annual report.

2. **Support the immediate appointment of a review commission, as required by law, to review and evaluate the activities and performance of JCOPE and the Legislative Ethics Commission (LEC).** This is long overdue: the statute required the governor and legislative leaders to appoint of the commission by June 1, 2014 at the latest, and required its report by March 1, 2015.

C. **A QUADRENNIAL COMPENSATION COMMISSION**

1. **Citizens Union supports the creation of a quadrennial compensation commission.** Features of a bill endorsed by Citizens Union:

   a. The commission would consist of 14 commissioners: six appointed by the governor, one by the AG, one by the comptroller, two by the temporary president of the senate, two by the assembly speaker, one each by the house minority leaders

   b. It would review stipends to determine whether they should be provided and the manner granted.

   c. Its recommendations would have the force of law on a given date unless the legislature sooner modified the recommendations by statute.

D. **LUMP SUM FUND PAYMENT REFORMS**

1. **There should be comprehensive, online disclosure of all grants and contracts expended under lump sum funds.** The proposed language in Governor Cuomo's 30-day budget amendments requires the assembly and senate to post on their website the new affirmation documents, in addition to documentation regarding each request, including: (1) names of grant recipients, amounts, (2) names of legislative sponsors and their districts; (3) location of grantees by district of the grant, and (4) the proposed administering agency.

2. Additional, comprehensive disclosure by fund and budget item should be made in a user-friendly format online such as an online searchable database, including the following:
   - all MoU's, plans, resolutions and other agreements specifying their distribution, which should identify elected officials' sponsorship of items;
   - funds distributed and their recipients; and
   - any remaining funds

3. Lump-sum appropriations should disclose in the state budget the detailed purposes and criteria set forth for their distribution;

4. For lump sum items distributed via Assembly or Senate resolution:
   - Such resolutions should be required to age for 3 days;
   - Resolutions should identify the legislative sponsor.

5. There should be a time limit for the reappropriation of lump-sums in order to decrease slush funds and the use of such funds as "one-shot" budget gap fillers.

III. APPENDIX: GOVERNOR CUOMO'S LIST OF IMPERMISSIBLE USES OF CAMPAIGN FUNDS

The governor's proposal to prohibit the personal use of campaign funds enumerates impermissible uses. The addition of such a list to the statute adopts the approach taken in both federal and New York City law, which both spell out for candidates a definition of "personal use" with an enumerated list. The governor's enumerated list consists of the following:

- household items, supplies, expenditures including mortgage, rent or utility payments on the family home not incurred as a result of the campaign or the person's execution of duties of office. If the person uses property for both personal and campaign use, any payment in excess of the fair market value of the amount paid for campaign use is personal use.
- mortgage, rent or utility payments on non-residential property not used for campaign purposes
- clothing, other than items used in the campaign
- tuition & childcare
- dues at a country club, health club or recreational facility unless for a specific fundraising event
- compensation to a person whose services are not solely for campaign purposes; compensation to a family member unless for bona fide services. If a family member provides services to a campaign, any compensation in excess of the fair market value of the services provided is personal use.
- payment of fines/penalties assessed pursuant this section of the law or in connection with a criminal conviction
- travel expenses, including car purchases and leases, unless used for campaign purposes or in connection with official duties; if a candidate uses campaign funds to pay for travel that involves both personal and campaign activities, the incremental expense that result from personal activities shall be considered for personal use
- any other expenditure designated by the board of elections as constituting a personal use

Lawyers Alliance *for* New York

Connecting lawyers, nonprofits, and communities

September 10, 2015

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Re: JCOPE Review Commission

To the JCOPE Review Commission:

I write, on behalf of Human Services Council ("HSC), Lawyers Alliance for New York and Nonprofit Coordinating Committee ("NPCC") to seek a meeting with the JCOPE Review Commission. We are concerned that the Public Integrity Reform Act of 2011, and JCOPE's interpretation of the Act, create inefficiencies that divert JCOPE from its core enforcement mission and, at the same time, unnecessarily impede compliance by nonprofit organizations without improving lobbying disclosure. We recommend that JCOPE stop requiring organizations to file the same information with both New York City and JCOPE and stop requiring separate JCOPE lobbyist and client reports from organizations using their own staff to lobby. We also recommend that the expenditure threshold triggering an obligation to register and report as a lobbyist or client be raised to $10,000.

HSC is a coalition of nearly 200 nonprofits strengthening the human services sector's ability to serve New Yorkers in need. As a non-partisan intermediary between government agencies and member organizations, we passionately champion the sector. We proactively negotiate with State and City government for mutually beneficial, solutions-based budget, policy, and legislative reform that improve our constituents' work and the lives of the individuals they serve.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. By connecting lawyers, nonprofits, and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers. We frequently provide advice and assistance to nonprofit organizations seeking to comply with the Lobbying Act.

NPCC is the voice and information source for New York nonprofits. NPCC is an umbrella organization representing and serving some 1,500 member nonprofit 501(c)(3) organizations throughout New York City, Long Island and Westchester. As the largest such organization in our area, we represent all types of nonprofits on sector-wide issues.

Regulatory Inefficiencies

As we describe below, too much of JCOPE's enforcement and compliance resources are spent ensuring that small organizations file duplicate reports regarding a single meeting with a government official. This reduces JCOPE's ability to ensure that all lobbyists and clients fully disclose their activities and expenditures in a meaningful way. At the same time, the unnecessary compliance burdens divert nonprofit staff from serving their communities and discourage them from educating government officials about the needs of those communities.

Nonprofit organizations seeking to ensure that NYC government responds to community needs must report that lobbying activity once to the NYC Clerk and again to JCOPE. Additionally, JCOPE requires organizations using their own staff for advocacy to report the same activity to JCOPE once as a lobbyist and again as a client. Thus, a single meeting with a NYC government official must be reported to JCOPE in an organization's Bi-Monthly Lobbyist Report and again in its Client Semi-Annual Report; it would also be reported to the NYC Clerk in a Lobbyist Periodic Report.

These registration and reporting burdens are considerable and can be overwhelming for an organization with just one or two staff people. An organization using its own staff to lobby NYC government must:

- register with JCOPE as a lobbyist every two years and with NYC every year,
- enroll in JCOPE's online filing system as a lobbyist and again as a client, and also enroll in NYC's online filing system as a client/lobbyist (with each enrollment requiring a separate user ID and password),
- file six Bi-Monthly Lobbyist Reports with JCOPE and six Lobbyist Periodic Reports with the NYC Clerk each year, and
- file two Client Semi-Annual Reports with JCOPE each year.

Even after a nonprofit has reported information multiple times, it may still be fined for reporting that same information late on yet another form. Nonprofits are underfunded and understaffed. Time spent drafting multiple mandatory filings for government agencies could be better spent serving the community. Many small nonprofits lack in-house counsel and find complicated reporting schemes baffling. The result: some nonprofits avoid advocating on behalf of their communities in order to avoid excessive paperwork. This frustrates the Lobbying Act's goal of

affording "the fullest opportunity...to the people to petition their government for the redress of grievances." Lobbying Act § 1-a.

Eliminating duplicate reporting would increase compliance by reducing confusion among regulated organizations. Nonprofit organizations find it hard to believe that the law really requires them to report the same meeting on two different forms, both of which are submitted to JCOPE, and then again to the NYC Clerk. As a result, some nonprofits unintentionally fail to file one set of reports or the other, increasing the enforcement burden on JCOPE.

Additionally, the Lobbying Act unnecessarily requires reporting by small organizations that engage in only a minimal amount of lobbying. The Commission on Public Integrity (JCOPE's predecessor) recommended raising the expenditure threshold to $10,000 for all filers, in order to "reduc[e] our workload, ... and allow us to focus on that population that may be poses a higher risk of violations while still providing information of almost all the lobbying activity that's currently being done."[1] In 2013, the NYC Lobbying Commission likewise stated that there is "a strong basis to recommend raising the [NYC] threshold to $10,000 for all filers."[2] Members of both commissions noted that doing so would still capture at least 98% of state and city lobbying expenditures.[3]

At the same time, this unnecessary reporting burden consumes the time of JCOPE staff who must administer an unwieldy system. Rather than monitoring whether multiple, duplicative reports have been filed by nonprofits engaged in a modest amount of lobbying activity, JCOPE's staff time would be more effectively devoted to investigating the unreported lobbying activities of major actors and enforcing the reporting obligations of elected officials. JCOPE's workload is due to increase dramatically, as it is now required to oversee the reporting of lobbying activities directed at small municipalities. The need to focus its resources on its highest priorities is greater than ever.

Our recommendations

In order to focus JCOPE's resources more efficiently and ameliorate the unnecessary burdens imposed on small organizations, we recommend the following measures:

1. Stop requiring organizations to file the same information with both NYC & JCOPE
   Organizations should be able to report information about their advocacy just once, to JCOPE, which has the broadest jurisdiction. JCOPE would share with the City Clerk all information submitted by clients and lobbyists regarding lobbying of New York City officials. The information should be shared promptly and in a data format allowing the City Clerk to fulfill its enforcement obligations. Organizations that want to take advantage of this streamlined procedure would simply file one report containing all of the information required by both the state Lobbying Act and the NYC Lobbying Law.

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[1] Testimony of Barry Ginsberg before the NYC Lobbying Commission, March 30, 2011, pp. 37-41, http://www.nyc.gov/html/lobby/downloads/pdf/033011lobbying.pdf.

[2] Final Report of the NYC Lobbying Commission (2013), p. 30.

[3] *See* Final Report of the NYC Lobbying Commission (2013), p. 29 (quoting testimony of Barry Ginsberg, Commission on Public Integrity), http://www.nyc.gov/html/lobby/downloads/pdf/033011lobbying.pdf; Tr. of Public Meeting of the NYC Lobbying Commission (June 24, 2011), p. 5 (statement of Hon. Herbert Berman, Chair), http://www.nyc.gov/html/lobby/downloads/pdf/062411lobbying.pdf.

JCOPE and the NYC Clerk have the authority to adopt this procedure. JCOPE and the City Clerk both have the authority to design forms for the submission of lobbyist and client reports.[4] The City Clerk could simply deem the requirement to file a Lobbyist Periodic Report to be satisfied by the filing of a JCOPE Lobbyist Bi-Monthly Report containing all of the information required by city Lobbying Law for the relevant reporting period. Likewise, the City Clerk could deem the requirement to file a Client Annual Report to be satisfied by the filing of a two JCOPE Client Semi-Annual Reports covering the relevant reporting period. JCOPE should be required to make every effort to persuade the NYC Clerk to adopt this procedure, and the Lobbying Act should be amended to require JCOPE and the NYC Clerk to cooperate in this fashion.

2. Stop requiring separate JCOPE lobbyist & client reports from organizations using their own staff to lobby: JCOPE should allow organizations using their own staff for lobbying on behalf of the organization to register and report as a lobbyist/client filer. JCOPE has the authority to adopt this procedure. The City Clerk has appropriately interpreted the city Lobbying Law (which has provisions regarding registration and reporting that are extremely similar to those in the state Lobbying Act) as allowing it to: a) permit an organization using its own staff for lobbying on behalf of the organization to register as a lobbyist/client filer, and b) deem the submission of a the final Lobbyist Periodic Report in a calendar year to constitute satisfaction of the requirement to file a Client Annual Report.[5] JCOPE should interpret the Lobbying Act in a similar manner.

3. Raise the expenditure threshold to $10,000: As we note above, JCOPE's predecessor and the NYC Lobbying Commission have each recommended raising the expenditure threshold to $10,000. Doing so would allow JCOPE to focus on higher spenders, who pose the greatest risk of lobbying violations, while still capturing the vast majority of state and city lobbying expenditures.

We would welcome the opportunity to meet with you to discuss these recommendations.

Sincerely,

Laura Abel

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[4] NYS Legis. Law § 1-d(d); NYC Admin. Code §§ 3-212.
[5] NYC Clerk, Lobbying Bureau, FAQs # 26, http://www.cityclerk.nyc.gov/html/lobbying/general%20topics.shtml.

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June 18, 2015

TO: JCOPE/LEC Review Commission
Anthony Crowell, New York Law School Dean
Michael Feldberg, former Assistant U.S. Attorney/SDNY
Seymour James, Attorney-in-Chief, Legal Aid Society/NYC
Tony Jordan, Washington County District Attorney
William LaPiana, New York Law School Professor
Elizabeth Moore, former counsel to Governor Mario Cuomo
Patricia Salkin, Touro Law School Dean
Dale Volker, former New York State Senator & Assemblyman

FROM: Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: Ensuring Honest Review by the JCOPE/LEC Review Commission
(1) Your Methodology for Reviewing and Evaluating the Joint Commission on Public Ethics & Legislative Ethics Commission – Including Public Hearings;
(2) Your Protocol with Respect to Conflicts of Interest

According to a May 1, 2015 press release posted on the Governor's website[1], you are the "eight individuals" who the Governor, Temporary Senate President, and Assembly Speaker appointed as the review commission "tasked with reviewing and evaluating the activities and performance of the Joint Commission on Public Ethics and the Legislative Ethics Commission", with your report due by November 1, 2015.

The press release does not indicate who of you is chair– or identify any of the circumstances giving rise to the JCOPE/LEC review commission, namely, that the Governor, Temporary Senate President, and Assembly Speaker, having willfully violated Section 21 of Part A of Chapter 399 of the Laws of 2011,then devised, in "three-men-in-a-room", behind-closed-doors fashion, to amend it as Part DD of Budget Bill S.2006-B/A.3006-B, introduced on March 31, 2015 and passed by the Legislature, hours later, *via* a "message of necessity".[2]

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1 "*Appointments to the JCOPE Review Commission, Announced by Governor, Senate and Assembly*", https://www.governor.ny.gov/news/appointments-jcope-review-commission-announced-governor-senate-and-assembly

2 Part DD of Budget Bill S.2006-B/A.3006-B reads:

Was a chair not jointly designated by the Governor, Temporary Senate President, and Assembly Speaker, as Part DD requires? I have been unable to locate any subsequent press releases announcing the chair – or furnishing contact information for the review commission, or identifying how you intend to go about your work.

Are there no subsequent press releases? Who among you has been designated chair and when was that designation made? Does the review commission have an office, a phone number, an e-mail, a website? Do you have staff – and who are they? What is your methodology? Will you be holding public hearings at which members of the public who have filed ethics complaints with JCOPE and LEC can testify and afford you the benefit of their direct, first-hand experience and insights? If so, when do you plan to announce those hearings?

If you are not planning public hearings, will you be privately taking testimony from members of the public who have filed ethics complaints with JCOPE and LEC? Will you be doing outreach to them – or must they reach out to you?

Please be advised that our nonpartisan, nonprofit citizens' organization, Center for Judicial Accountability, Inc. (CJA), has filed conflict-of-interest ethics complaints with both JCOPE and LEC. These complaints establish, *prima facie* and conclusively, that JCOPE and LEC are corrupt facades, brazenly violating the statutory and rule provisions under which they are supposed to operate so as to "protect" their appointing authorities –the Governor and Legislative Leaders – and other influential or connected persons from investigation, prosecution, and sanction.

In the likely event that the staff and members of JCOPE and LEC have not alerted you to CJA's ethics complaints and your duty, as the review commission, to "blow the whistle" on their "protectionism" and cover-up, the complaints are posted on CJA's website, www.judgewatch.org.

"Section 1. Section 21 of part A of chapter 399 of the laws of 2011, relating to establishing the public integrity reform act of 2011, is amended to read as follows:

S 21. No later than [June 1, 2014] MAY 1, 2015, the governor [and], the [legislative leaders] TEMPORARY PRESIDENT OF THE SENATE AND THE SPEAKER OF THE ASSEMBLY shall jointly appoint a review commission to review and evaluate the activities and performance of the joint commission on public ethics and the legislative ethics commission in implementing the provisions of this act. On or before [March] NOVEMBER 1, 2015, the review commission shall report to the governor and the legislature on its review and evaluation which report shall include any administrative and legislative recommendations on strengthening the administration and enforcement of the ethics law in New York state. The review commission shall be comprised of eight members and the governor [and], the [legislative leaders] TEMPORARY PRESIDENT OF THE SENATE AND THE SPEAKER OF THE ASSEMBLY shall jointly designate a chair from among the members.

S 2. This act shall take effect immediately."

accessible from the prominent homepage link: "Exposing the Fraud of the Commission to Investigate Public Corruption". This brings up a menu page with a link entitled "Going Where the Commission to Investigate Public Corruption Did NOT: ...JCOPE".

The first three items on that JCOPE webpage are our July 11, 2014 and July 18, 2014 letters culminating in our December 11, 2014 ethics complaint to JCOPE which was a complaint against JCOPE and its appointing authorities – the Governor and Legislative Leaders – for their violation of Public Officers Law §74 relating to conflict of interest with respect to Section 21 of Part A of Chapter 399 of the Laws of 2011: the essentially identical review commission that the Governor and Legislative Leaders (minority, in addition to majority) were required to appoint by June 1, 2014, but did not, and whose report was due by March 1, 2015 (fn. 2, *supra*).

In pertinent part, our December 11, 2014 ethics complaint states:

> "any legitimate review commission would have to 'blow the whistle' on JCOPE and expose its corrupt protectionism of the Governor and Legislative Leaders – as proven, resoundingly, by CJA's June 27, 2013 ethics complaint against them and other public officers that JCOPE has been sitting on, now going on 18 months." (at p. 2, underlining in the original).

JCOPE has now been sitting on CJA's June 27, 2013 ethics complaint for nearly 24 months – a dereliction that has cost New York taxpayers upwards of $120 million in statutorily-violative, fraudulent, and unconstitutional judicial salary raises that the Governor, Attorney General, Comptroller, and Legislators were duty-bound to void, *but did not, because judicial salary raises were the means to their own salary raises*. And reinforcing the truth of what pages 4-6 of the June 27, 2013 complaint particularize as to the violations of Public Officers Law §74 by the Governor, Attorney General, Comptroller, and Legislators, born of their "self-interest in the judicial pay raises" and their "self-interest in the 'success' of the statute creating the Commission on Judicial Compensation", is that in this year's "three-men-in-a-room", behind-closed-doors, budget deal-making – to which rank-and-file Legislators gave their rubber stamp – the Governor, Temporary Senate President, and Assembly Speaker inserted into Budget Bill S.4610-A/A.6721-A a Part E, repealing the statute that had created the Commission on Judicial Compensation and putting in its place a Commission on Legislative, Executive, and Judicial Compensation, structured in materially-identical fashion.[3]

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[3] On its face, Part E, establishing a Commission on Legislative, Executive, and Judicial Compensation is as unconstitutional as the repealed provision of Chapter 567 of the Laws of 2010, establishing the Commission on Judicial Compensation, as it identically allows the Commission's salary increase recommendations to have the force of law, automatically, without executive or legislative action. And because of executive and legislative self-interest, to which JCOPE's nonfeasance has given a green light, no executive or legislative action will restrain the Commission from operating in the same statutorily-violative, fraudulent, and unconstitutional fashion as the Commission on Judicial Compensation did, with consequences catastrophic for the People of New York.

That legislative rules vest coercive, autocratic powers in the Temporary Senate President and Assembly Speaker, so impinging upon the exercise of independent judgment by rank-and-file Legislators that they surrender legitimate legislative process – as with Budget Bill S.4610-A/A.6721-A, introduced and passed on the same day, March 31, 2015, with an assist by the Governor through a "message of necessity" – is a further important issue presented by the June 27, 2013 complaint that JCOPE has been sitting on.

Plainly, you have relationships and associations with the Governor, Temporary Senate President, and Assembly Speaker who appointed you to the review commission and with other persons who are the subject of CJA's two conflict-of-interest JCOPE complaints. Likewise you have relationships and associations with the multitude of persons complicit in JCOPE's corruption, as for instance, U.S. Attorney for the Southern District of New York Preet Bharara, a recipient of CJA's December 11, 2014 complaint, just as he was of CJA's underlying July 11, 2014 and July 18, 2014 letters. What is your protocol for dealing with conflicts of interest?

For example, undisclosed by the May 1, 2015 press release, with its brief bios of each of you, is that Seymour James was a member of the Commission to Investigate Public Corruption. I testified before the Commission on September 17, 2013, furnishing the June 27, 2013 ethics complaint in support of my testimony. How will Mr. James be able to discharge his duties as a member of this review commission when doing so will expose his past dereliction and that of the Commission to Investigate Public Corruption with respect to the June 27, 2013 ethics complaint – and with respect to CJA's underlying April 15, 2013 criminal complaint to U.S. Attorney Bharara on which it rests, that U.S. Attorney Bharara has been sitting on.[4] Will he – and you – have the independence to follow the evidence of JCOPE's corruption that directly leads to U.S. Attorney Bharara and brings within its wake a "who's who" of powerful, influential persons? These include the other indicated recipients of CJA's December 11, 2014 ethics complaint, especially those addressed by our December 12, 2014 coverletter: Attorney General Eric Schneiderman, Albany County District Attorney P. David Soares, U.S. Attorney for the Northern District of New York Richard Hartunian, and the former U.S. Attorney for the Eastern District of New York, the now United States Attorney General, Loretta Lynch.

In the interest of transparency, this letter has been posted on CJA's webpage "Going Where the Commission to Investigate Public Corruption Did NOT…JCOPE". For your convenience, our webpage for this letter also posts our two ethics complaints that went nowhere at JCOPE, as well as ethics complaints that others filed with JCOPE, likewise against high-ranking public officers, that

[4] On October 17, 2013, I sent an e-mail directly to the members and special advisors of the Commission to Investigate Public Corruption, attaching a letter pertaining to my September 17, 2013 testimony. Identifying that I had no e-mail address for Commissioner James, among others, the transmitting e-mail requested that they forward it to him "so that all may be held accountable to the People whose trust in New York's government and its public officials the Commission is supposed to restore." The e-mail and its transmitted letter are enclosed herewith, as well as posted, with this letter, on CJA's website, *infra*, together with my September 17, 2013 written statement and the video of my September 17, 2013 oral testimony.

similarly went nowhere. Presumably, U.S. Attorney Bharara obtained all these complaints when, in late April 2014, he reportedly served JCOPE with a subpoena for all complaints filed with it.[5]

Enclosure: CJA's October 17, 2013 e-mail and letter to members & special advisors of the Commission to Investigate Public Corruption

cc: Joint Commission on Public Ethics (JCOPE)
Legislative Ethics Commission (LEG)
U.S. Attorney for the Southern District of New York Preet Bharara
All recipients of CJA's December 11, 2014 ethics complaint, plus
Temporary Senate President John Flanagan
Assembly Speaker Carl E. Heastie
The Public & The Press

[5] See, CJA's July 11, 2014 letter (fn. 4) and July 18, 2014 letter (fn. 1), underlying and annexed to CJA's December 11, 2014 ethics complaint.

Appendix F

Articles Regarding Review Commission's Work

New York Law Journal

Members of JCOPE Study Panel Are Announced

Joel Stashenko, New York Law Journal

May 5, 2015 | 0 Comments

Gov. Cuomo

Tim Roske

The attorneys and officials who will review the performance of the state Joint Commission on Public Ethics have been announced by Gov. Andrew Cuomo and state legislative leaders.

Establishing the panel and ordering the review were in legislation that created JCOPE in 2011. Panel members will report their findings on the commission's work and recommend improvements by Nov. 1.

Named to the commission were: New York Law School Dean Anthony Crowell; Allen & Overy partner Michael Feldberg; Seymour James, attorney in charge of the Legal Aid Society of New York City; Washington County District Attorney Tony Jordan, a former state assemblyman; New York Law School Professor William LaPiana; Consolidated Edison General Counsel Elizabeth Moore, former counsel to governor Mario Cuomo; Touro Law School Dean Patricia Salkin and Dale Volker, former Buffalo assemblyman and senator.

JCOPE reviewers meet with commission critics

Citizens Union Executive Director Dick Dadey. (CUNY TV)

By JIMMY VIELKIND 5:16 a.m. | Aug. 20, 2015 1

ALBANY — The commission tasked with examining New York's ethics watchdog met last week with some of its most persistent critics, POLITICO New York has learned.

The Joint Commission on Public Ethics' review board, which was (tardily) appointed in May, huddled in Manhattan with leaders of Common Cause New York, the New York Public Interest Research Group, League of Women Voters and Citizens Union.

That group's executive director, Dick Dadey, said members of the review commission, led by Anthony Crowell, the dean of New York Law School, showed "sincere interest" in the advocates' thoughts.

"They were very much interested in our organizations' past recommendations and current ones. That was a very positive sign," Dadey said. "This was not for show. It wasn't a meeting where there was a box checked off."

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JCOPE was created by the 2011 merger of the Commission on Public Integrity, which oversaw lobbyists and executive branch officials, and the Legislative Ethics Commission, which proved lackluster in policing members of the Assembly and Senate. The idea was to have an independent entity with the ability to begin ethics investigations of

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state lawmakers, but JCOPE's enabling legislation included a provision that would let members of each legislative majority secretly veto investigations.

The agency has been dogged by concerns about secrecy and how closely it is controlled by Gov. Andrew Cuomo. JCOPE's last meeting began with an hour-long back-and-forth about hiring, with several commissioners saying its next executive director should have no ties to Cuomo. (Its first two had previous stints as close Cuomo aides.)

The review commission is charged with evaluating JCOPE's activities and performance, and issuing recommendations. Its report is due Nov. 1.

Blair Horner, the longtime executive director of NYPIRG, said the meeting — to which he and Barbara Bartoletti of the League of Women Voters phoned in — was "welcome."

"They were seemingly beginning their fact finding, and it was good they were doing what they were doing. From our point of view, we want them to push the envelope and look at both JCOPE and the Legislative Ethics Commission comprehensively," Horner said. "The report, I think, contains an opportunity for the governor to convene a special session on ethics."

Despite high-profile charges and convictions, Cuomo has said he has no plans to do so.

In response to a phone call, Crowell and Patricia Salkin—the dean of Touro Law Center and another member of the review commission—issued a statement saying last week's gathering was "productive and part of a broad outreach" that will include additional meetings over the next six weeks.

MORE: ALBANY ANDREW CUOMO BLAIR HORNER CITIZENS UNION COMMON CAUSE DICK DADEY ETHICS JCOPE LAW LEAGUE OF WOMEN VOTERS LOBBYING NYPIRG

Author: **JIMMY VIELKIND**

MORE IN ALBANY

Nuclear company lose tax fight in New York's highest court

NY Reform groups have high hopes for ethics review panel

by Karen DeWitt

Joint Commission on Public Ethics Chair and Westchester County District Attorney Janet DiFiore (right), along with former Executive Director Ellen Biben (left) at a 2012 JCOPE meeting. NCPR file photo: Karen DeWitt

Listen to this story

Aug 26, 2015 — The controversial New York State ethics commission is in the midst of a review by a panel

give their opinions on how to fix some of the commission's problems.

Governor Cuomo and state lawmakers designed the Joint Commission on Public Ethics (JCOPE) four yea ago. It replaced a former ethics commission that also was troubled. The Commission has been criticized fc operating in almost total secrecy and for a weak voting structure that enables commissioners to stymie an ethics investigation that politicians who appointed them may not like.

The commission members have said they have to operate mostly in private because they conduct corrupti related probes, and targets are considered innocent until proven guilty. The review panel has already reacl out to reform groups. Blair Horner, with the New York Public Interest Research Group (NYPIRG), said he a preliminary meeting with the panel. "They're just beginning that process," Horner said. "We've urged then continue working." The New York Public Interest Research Group backs a number of changes, including making the ethics commission subject to Freedom of Information and Open Meeting Laws.

The League of Women Voters' Barbara Bartoletti also met with the reform panel. She said the first goal is t find ways to restore public trust in JCOPE in an atmosphere of public corruption by elected officials. "They need to feel these people are doing their jobs," Bartoletti said. "And I don't think they have felt that."

Two top legislative leaders have been arrested on federal corruption charges this year, and two other top lawmakers were convicted this summer of fraud and lying to FBI agents. Bartoletti said the structure of JCOPE, which has 14 commissioners, is also unwieldy. The ethics commission lost two executive directo less than four years. Both had formerly worked for Governor Cuomo, one returned to the administration, th other is working in the private sector. Commissioners appointed by legislative leaders have complained of excessive control by the governor.

At a rare public airing of their differences, some commissioners at the August meeting of JCOPE said they don't want another associate of Cuomo's to be the next executive director. Commissioner Marvin Jacobs v appointed by former Assembly Speaker Sheldon Silver who had to resign as speaker after his arrest in lat January. "I hope the process will be reformed this time around," said Jacob. "And we will truly do a search find a person who is truly independent."

Commissioner Mary Lou Rath, who was appointed by former Senate Leader Dean Skelos, who also had t resign his leadership post after corruption charges, agreed with Commissioner Jacobs. "We need a differe approach," Rath said at the meeting. The commissioners were also angered because before the previous executive director left her job, she hired two new employees, both Cuomo associates, to work at the commission. Jacobs said under JCOPE's statute, commissioners are supposed to pick the staff.

Bartoletti said the reform panel looking into JCOPE, is made up of "irreproachable" appointees, including its chair, former Albany Law School Dean and now Dean of the Touro Law School, Patricia Salkin. It also includes a former Republican State Senator, Dale Volker from Western New York, and a former long-time a to Governor Mario Cuomo, Elizabeth Moore, and others. She said because Governor Cuomo and the legislature are reluctant to call a special session to address ethical issues, the panel could provide a needed impetus for change. "This review commission is our single best hope for turning things around," Bartoletti s

The review commission is due to issue a final report by November 1. The governor and legislature would s have to approve any proposed changes to the ethics commission.

Panel reviewing NY ethics commission to hold hearings

by Karen DeWitt

Ex-New York Assembly Speaker Sheldon Silver. Photo: NYer42, released to public domain.

Listen to this story

Sep 25, 2015 — New York State's troubled ethics commission will be the subject of two hearings, one in Alba on October 7 and another in New York City on October 17. Reform groups said they are ready with

The panel, created by Governor Cuomo in May, is tasked with looking at ways to improve the Joint Commission on Public Ethics, or JCOPE, which has been widely criticized as secretive and ineffective. Governor Cuomo and the legislature created the JCOPE during the governor's first months in office in 201

Dick Dadey, with Citizens Union, said the hearings are a chance for New Yorkers to weigh in on how to cl up public corruption. "This will be the first time that New Yorkers will have an opportunity to voice their interests and concerns over state ethics and oversight and enforcement," Dadey said. "

Citizens Union and other groups have already spoken to the panel in private to offer their suggestions to fi JCOPE, but also intend to speak at the hearings. Blair Horner is with the New York Public Interest Resear Group, which was skeptical of the commission from the beginning. He said the central issue is whether the ethics commission is independent enough to do its job. He said the 14 appointees can band together in factions to veto any probes that might harm a legislative leader or the governor. He said Cuomo appointee have too much power to steer hiring of commission staff, which has led to the governor's close allies servi as executive director and chief counsel for the commission. "He's been able to orchestrate the votes, we believe, to ensure that the last two executive directors were former employees of the governor's office," Bl said. "We don't think that should be the case."

At the last JCOPE meeting held over the summer, there was a rare public outburst by some appointees af the commission's second executive director resigned to take a job in the Cuomo administration. They feare the governor would engineer the hiring of yet another Cuomo associate as executive director. The commissioners were also angry because before the previous executive director left her job, she hired two employees, both Cuomo associates, to work at the commission even though appointed members are supposed to choose the staff.

In a time when both leaders of the legislature are under federal indictment for running major corruption schemes, and several other lawmakers have been arrested and jailed, JCOPE has not announced any ma punitive actions or findings of wrongdoing, and any probes they have undertaken have been closed to the public.

It is supposed an independent watch dog that

Horner said the he hopes the review panel will look "broadly" at a large restructuring of JCOPE and "push the envelope" in its ultimate recommendations. "It's supposed an independent watch dog that not o barks, but bites when necessary," he said. "We think that New Yorker

not only barks, but bites when necessary.

Dadey said he thinks that despite all of the secrecy JCOPE has done "reasonably well," given its limitations. He said the commission's insistence on greater disclosure of legislator's outside income helped le to the federal cases against former Assembly Speaker Sheldon Silver former Senate Leader Dean Skelos. Both are charged with illegally monetizing their elected positions by accepting millions of dollars from law firms, real estate developers, ar other private businesses in exchange for political favors. "I don't think that we would have seen these two arrests were it not for the amount of disclosure around legislators' outside income that has happened," saic Dadey.

He said many of JCOPE's secrecy rules and the power to quell investigations came at the insistence of th former leaders of the legislature, who now face corruption trails in November. "One could argue that they w protecting their own individual skins in the crafting of this legislation back in 2011," Dadey said. He said perhaps their successors, Speaker Carl Heastie and Senate Leader John Flanagan, who said they will not accept outside income, may be more amendable to changes.

The review panel's report is due November 1.

Will review of ethics watchdog have bite?

Six weeks before deadline, a question of depth

By Chris Bragg Published 8:24 pm, Sunday, September 20, 2015

timesunionPLUS

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Albany

A panel reviewing the operations of the state's ethics and lobbying watchdog, the **Joint Commission on Public Ethics**, faces a Nov. 1 deadline to issue a report on its findings. But it's not clear how deeply the panel can or will delve into the operations of an entity often criticized for its secrecy and charged with a lack of independence.

About six weeks from the deadline, one review panel member, **Patricia Salkin**, said she was not aware of any efforts to request nonpublic documents from JCOPE that might shed light on a watchdog that makes many of its decisions behind closed doors.

Unlike Gov. **Andrew Cuomo**'s defunct **Moreland Commission** on public corruption, the review panel lacks subpoena power; the 2011 legislation that created JCOPE requires that a majority of its 14 commissioners would have to vote to release confidential information voluntarily.

There are legitimate reasons why JCOPE might want to keep information about ethics inquiries confidential, experts say, but a lack of any documentation concerning its behind-the-scenes operations could made a candid review of its operations more difficult.

Salkin said she did not believe the review panel had asked for documents such as notes from JCOPE executive sessions. At its monthly meetings, JCOPE commissioners often do little business during what's usually a brief public session, and instead engage in lengthy executive sessions that are closed to the press and public.

The **Times Union** also asked Salkin, dean of Tuoro Law Center on Long Island, whether the review panel had asked JCOPE for any records of investigations that were opened but never ended up in enforcement actions or settlements, or asked to see requests for investigations JCOPE had received.

"Not to my knowledge but I am just one member," Salkin said via email.

Calls and emails to a number of other members of the review panel were not returned.

JCOPE, whose commissioners are appointed by Cuomo and legislative leaders, has faced criticism for rarely taking action against state lawmakers, even as federal authorities this year charged a raft of legislators with crimes related to official corruption. This year, the arrestees included **Dean Skelos** and **Sheldon Silver**, respectively the former leaders of the **Senate and Assembly**; both say they are innocent and are awaiting trial.

Under JCOPE's rules, even if a clear majority of commissioners favor launching an official investigation, it can be killed by a small minority. And it can be done secretly.

Some critics believe Cuomo and the legislative leaders who appointed the JCOPE review panel do not want a truly thorough review of its operations. JCOPE has faced particular criticism for its perceived closeness to the Cuomo administration.

Under the ethics reform law that created JCOPE, the panel was supposed to begin its work in June 2014, but its members were not appointed until this May 1.

As of early August, the review panel had held one live meeting and one conference call — neither of them open to the public.

According to Salkin, the review panel is in the process of scheduling a public hearing in Albany on Oct. 7, and scheduling a series of meetings in Albany on Sept. 28.

Salkin said interviews of JCOPE staff and commissioners have been conducted, and were ongoing. It's unclear how revealing those will be, however: JCOPE commissioners and staff, are required to sign non-disclosure statements saying they will not discuss confidential commission information, subject to a criminal penalty.

The review panel did confer in mid-August with leaders of several good-government groups, including **Barbara Bartoletti** of the **League of Women Voters**. Bartoletti said she was impressed by the academic credentials of the eight volunteer commissioners, and believed they would be independent.

The topic of whether the review panel was requesting documents from JCOPE did not come up at the meeting.

"Considering most of the people on the panel are very accomplished lawyers, I can only assume they thought about it and decided legally they can't do it," Bartoletti said.

But JCOPE's commissioners can collectively choose to make such information public. The law states that, "Any confidential communication to any person or entity outside the commission related to the matters before the commission may occur only as authorized by the commission."

JCOPE commissioners themselves have said they to want to make more information public.

In a February report on its own workings, the watchdog's very first recommendation was that lawmakers change state law to "provide JCOPE with more flexibility to make information public by a vote of the commissioners, including the ability to make investigative findings public if no legal violation is found or if JCOPE determines not to investigate."

The commissioners also implored lawmakers to consider whether JCOPE's current exemptions from the Freedom of Information Law and Open Meetings Law should be "modified to increase the transparency of JCOPE's operations while still protecting the integrity of JCOPE's sensitive compliance and investigative functions."

David Grandeau, the state's former top ethics official and now a lobbying compliance lawyer, first raised some of these issues on his ethics and lobbying blog on Tuesday.

Grandeau, a strident JCOPE critic, posted an email he had received Tuesday morning from Salkin, in which she asked for Grandeau's input on the JCOPE review, and invited him to testify at the October public hearing.

Grandeau responded by asking Salkin to provide him with a list of investigations opened by JCOPE, files for concluded cases, minutes of executive sessions and transcripts of interviews of past and present JCOPE commissioners and staff.

"If you have these items I would be happy to review them prior to my appearance before your review commission so as to provide meaningful input on (JCOPE's) 'activities and performance,'" Grandeau wrote, adding later that "if you haven't requested or reviewed those items nothing else you do will have any value or worth."

Salkin did not provide Grandeau such documents in a follow-up email, as they apparently have not been requested by the review panel during its four-and-a-half month existence.

Salkin told the Times Union Tuesday, "I received David's suggestion this morning; the commission as a whole has not seen it yet. It will be shared with everyone."

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CAPITOL CONFIDENTIAL

LATEST NEWS FROM THE TIMES UNION CAPITOL BUREAU

JCOPE review panel sets two — count 'em! — hearings

By Casey Seiler, Capitol bureau chief on September 22, 2015 at 5:15 PM

1

The review panel appointed in May to review the operations of the state Joint Commission on Public Ethics has scheduled two public hearings to receive public comments on the workings of JCOPE and the Legislative Ethics Commission.

The first hearing will be held 11 a.m. to 3 p.m. Wednesday, Oct. 7, at Albany Law School; the second will run 11 a.m. to 3 p.m. the following Wednesday, Oct. 14, at New York Law School, located at 185 West Broadway in New York City.

(John Carl D'Annibale, Times Union)

"In order to accommodate everyone who wishes to be heard, the public is encouraged to sign up in advance at admin@nyethicsreview.org," the panel said in its release. Written testimony can be submitted, as well.

The deadline for the panel to submit its findings is Nov. 1, though the state has **not exactly been a stickler** for holding this effort to hard deadlines: According to the 2011 legislation that created JCOPE, the panel was supposed to have been named by

June 1, 2014, and complete its work by March 1.

As the TU's Chris Bragg **reported on Monday**, the review panel will likely not be seeking to pierce the veil of what happens out of public view at JCOPE.

The watchdog's next meeting ~~has not yet been scheduled~~ will be held **Oct. 7**, the same day as the review panel's Albany session. The public portion of JCOPE's most recent gathering included much wrangling over the current search for a new executive director following the departure of Letizia Tagliafierro.

Categories: FEATURED, JCOPE

JCOPE review panel cancels Albany hearing

By Casey Seiler, Capitol bureau chief on October 2, 2015 at 4:53 PM

2

If you were torn between attending Wednesday's meeting of the state Joint Commission on Public Ethics or the first hearing of the long-delayed JCOPE Review Commission, we have great news: The Review Commission has cancelled its hearing.

The panel, which is supposed to file its report by Nov. 1, will instead hold only a single hearing, from 11 a.m.-2 p.m. Oct. 14 at New York Law School in Manhattan, before submitting its findings.

The Review Commission's brief notice of the Albany cancellation gave no reason. David Grandeau, the former top ethics watchdog turned irrepressible and comma-challenged anti-JCOPE gadfly, has **weighed in.**

The members of the Review Commission were appointed by Gov. Andrew Cuomo, Assembly Speaker Carl Heastie and former Senate Majority Leader Dean Skelos.

JCOPE itself is scheduled to meet Wednesday morning. Chris **Braggwrote in Friday's TU** about its veiled search for a new executive director.

Update: Ariel Dvorkin, acting as a spokeswoman for the review panel, explained:

> "The hearing was going to overlap almost fully with JCOPE's public meeting, and it wasn't the Commission's intention to pose a conflict with that meeting. Furthermore, nearly everyone who expressed interest in testifying wanted to do so at the NYC hearing on October 14. Members of the Commission continue to remain available to speak to anyone who wants to engage, and written comments are welcomed as well."

Categories: FEATURED, JCOPE

A guide to what the JCOPE review commission will be looking at

JCOPE meeting. (Jimmy Vielkind)

By **BILL MAHONEY** 5:27 a.m. | Oct. 13, 2015

ALBANY — The 2011 bill that created the Joint Commission on Public Ethics was praised as a milestone by Albany's leaders.

"[T]he ethics agreement signals that we've taken another step in restoring the public's trust in their government," then Senate Majority Leader Dean Skelos said at the time.

Skelos' counterpart in the Assembly echoed that view: "While it is true, as in any profession, that some legislators and lobbyists have taken advantage of the system, the vast majority of my colleagues are hard-working, caring and public spirited," said Sheldon Silver, who was Assembly speaker at the time. "I am proud to sign onto today's agreement because I believe that transparency and accountability are the pillars of good government."

Since then, Skelos and Silver have been arrested on corruption charges and have resigned their leadership posts. Some of their colleagues have also been arrested: Tom Libous, Malcolm Smith, John Sampson, William Scarborough, William Boyland, Gabriella Rosa, Nelson Castro, Shirley Huntley and Eric Stevenson. And several others — Vito Lopez, Dennis Gabryszak, Micah Kellner, and Naomi Rivera — have been forced from office for alleged activities widely deemed unseemly.

JCOPE has mostly sat on the sidelines, playing a role in the ouster of just one

MORE ON POLITICO

- Nuclear company lose tax fight in New York's highest court
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- Cuomo signs 40 bills, vetoes 23

official: Lopez left the Legislature after new details about his treatment of female staffers emerged in a JCOPE report that was written after he had already been censured by the chamber's leadership.

"The thing that's worked well when you have ethics boils down to two words — Preet Bharara," said Blair Horner of the New York Public Interest Research Group. Bharara is the U.S. Attorney whose investigations have led to the arrests of many of the legislators.

The bill that created JCOPE required the creation of a commission to review how well the new ethics regime worked. It was scheduled to begin its work in June 2014, but legislative leaders and Gov. Andrew Cuomo missed that deadline and extended the timeframe a month after the scheduled release of the panel's final report this past March.

On Wednesday, the review commission, tasked with making "administrative and legislative recommendations on strengthening the administration and enforcement of the ethics law in New York State," is scheduled to hold its first public hearing.

Here's a guide to what they might be looking at.

Ethics disclosure

Public officials' outside business interests have become more transparent over the past four years. Before the bill creating JCOPE was passed, constituents who wanted to see what their lawmakers did on the side would need to request the information from the Legislative Ethics Commission. What they received censored information such as how much the lawmakers actually earned for these jobs.

The forms are now posted on JCOPE's website and contain letters that symbolize relatively narrow ranges of earnings. Due to a series of changes in state ethics laws, officials now need to disclose more — though not all — information about clients they represent.

There would seem to be some room for improvement in the way these forms are handled. The 2011 bill passed after revelations former Senate majority leader Joe Bruno advised members of his conference to physically deliver the forms to avoid the risk of being hit with federal mail fraud charges. The bill now requires officials to submit the forms via the U.S. Postal Service. Because of this, many are written in barely legible handwriting and none of the forms is machine-readable. If a member of the public wants to see which officials might reap financial awards from legislation that would help a particular corporation, they to manually read through thousands of pages.

While there have been improvements, it seems unlikely JCOPE has been aggressive in examining these forms to ensure their veracity.

Every year, some officeholders and candidates have been dinged for late filings. But JCOPE has only once accused a filer of submitting inaccurate reports. Several weeks after criminal charges against Silver were announced earlier this year detailing his alleged work at a second law firm, the commission accused him of filing deficient reports that did not disclose this employment. It's possible the commission had examined a large number of disclosure reports and

simply did not get to this one rare example of a form that is allegedly misleading. But it's also feasible other lawmakers have filed misleading reports knowing the state's internal ethics enforcement agencies were unlikely to look at them through a microscope.

Ethics enforcement

This perceived lack of enforcement gets to the crux of most of the criticism leveled at JCOPE. Its commissioners are appointed by the governor and legislative leaders and effectively have veto power over actions taken against the legislators who appointed them. An investigation into a member of the Assembly Democratic conference, for example, needs the support of at least one of the three members appointed by the Assembly Democratic leader. The law that created JCOPE exempts it from the state's open meetings and Freedom of Information laws, so there is no way the public can discern how often this scuttling of investigations occurs.

"We act the way the law spells out," JCOPE spokesman Walt McClure said. "The law may not allow us to do everything that everyone wants us to do, but we're working as hard as we can and the best we can in the confines of the statute around us that sets us up and governs us."

Outsiders, however, have frequently viewed these confines of the law as inherently debilitating and responsible for the large role federal prosecutors have taken in investigating New York politicians.

"I don't think anyone defends JCOPE," said NYPIRG's Horner. "I think its creation contains fatal flaws, and the flaws really stem from a lack of independence and a requirement that it operates in secret. I think both of those turned out to be big problems."

Horner cited several changes that might improve the commission's efficiency, such as creating a smaller commission that includes members appointed by the

attorney general and comptroller and making sure executive directors have not been "recycled through the legislative and executive branches."

(Disclosure: I previously worked for Horner at NYPIRG. The group supported the bill that created JCOPE, partially because it included a recommendation made by NYPIRG's Gene Russianoff to include the provision mandating the review commission.)

Ravi Batra, a former JCOPE commissioner, was more bearish about the agency's future prospects.

"There is no minor tinkering. It requires a chemotherapy because you have to literally kill the cancer of corruption that is now embedded in the spectrum of JCOPE, both in design and practice," he said. "It cannot work because the way it's set up and how it has been functioning have proven it cannot work."

To David Grandeau, who directed a JCOPE predecessor agency that regulated lobbying, the problem comes down to the specific people who have been selected as commissioners, whom he dubs "a bunch of low-achieving fifth graders."

"Too many damn lawyers," Grandeau said. "You'd be much better off walking down the block and tapping six people on the shoulder and saying 'you're it.' ... You just need common sense and honesty, and they haven't had it in a long, long time."

Despite this criticism, John Feerick, a former dean of Fordham Law School who chaired both Mario Cuomo's Moreland Commission on Government Integrity and a different JCOPE predecessor agency that was created after Grandeau's was dissolved, said the job of a commissioner can be unforgiving.

"It was good for my character development," he said. "You take on something you don't particularly enjoy but you've got a public duty and you've got to give it all to your public duty and accept the criticisms that come and just hope that

when it's all over, you've got your reputation."

Notably, JCOPE itself has called for reforms to its transparency. In a report released in February, the commissioners called upon the Legislature and governor to change the law to provide the commission "with more flexibility to make information public by a vote of the commissioners" and to "consider" changings its exemptions from FOIL.

This report took a pass on recommending changes to JCOPE's voting structure, saying "questions concerning JCOPE as an institution ... are the prerogative of the Executive and Legislative Branches of government."

Lobbying

There haven't been many criticisms of JCOPE's handling of routine violations of lobbying law, though the agency hasn't secured many large settlements, like the $250,000 and public apology Grandeau forced from Donald Trump in 2000.

There is recognition there's room for more disclosure among lobbyists. Since the 2011 law passed, a number of campaigns have avoided disclosing their donors. In other cases, former lobbyists have shifted to a "consulting" model that lets them avoid any disclosure at all. In many cases, these groups have been advised by Grandeau himself on how to avoid identifying how they're raising or spending money.

JCOPE has called for reforms in this area. Its February report called for "a review of the Lobbying Act" that would make sure "forms of government advocacy used today" are captured.

Other areas

It's generally presumed the review commission will focus on areas treated by the 2011 bill. But some outside observers think a full analysis of the state's ethics laws would involve a broader set of recommendations.

"A lot of focus was placed by our commission on subjects having to do with campaign finance reform," Feerick said of his Moreland Commission under the first Cuomo administration. "If there was any imperative or need at this time, I think it's a focus on public financing to open up the competition that's so important to the health of our democracy."

Will it matter?

This isn't the first time a commission formed under Gov. Andrew Cuomo has been tasked with reviewing ethics in New York, though the recent Moreland Commission to Investigate Public Corruption was unceremoniously shuttered before it could complete its work.

There have been allegations the governor's office meddled with Moreland's investigations, just as there have been critiques the governor wields too much influence over JCOPE. The ethics review commission, just like the agency it's reviewing, contains members appointed by Cuomo and the legislative leaders

Grandeau pointed to one member, Touro Law Dean Patricia Salkin, as evidence this new entity, like others, was too closely connected to the existing infrastructure of state government.

"Her husband does a ton of business with the state of New York," he said. "His livelihood is dependent on whether the state keeps using him."

Feerick — who said he was unaware of Salkin's presence on the review commission before he suggested her as the type of individual who would be qualified to lead such an entity — spoke much more highly of her potential.

"She's really a very, very fine person. A commission with her is fortunate to have her ...," he said. "She has given a lot of support educationally and otherwise to keeping reform agendas alive."

The review commission is scheduled to meet at 11 a.m. Wednesday at the New

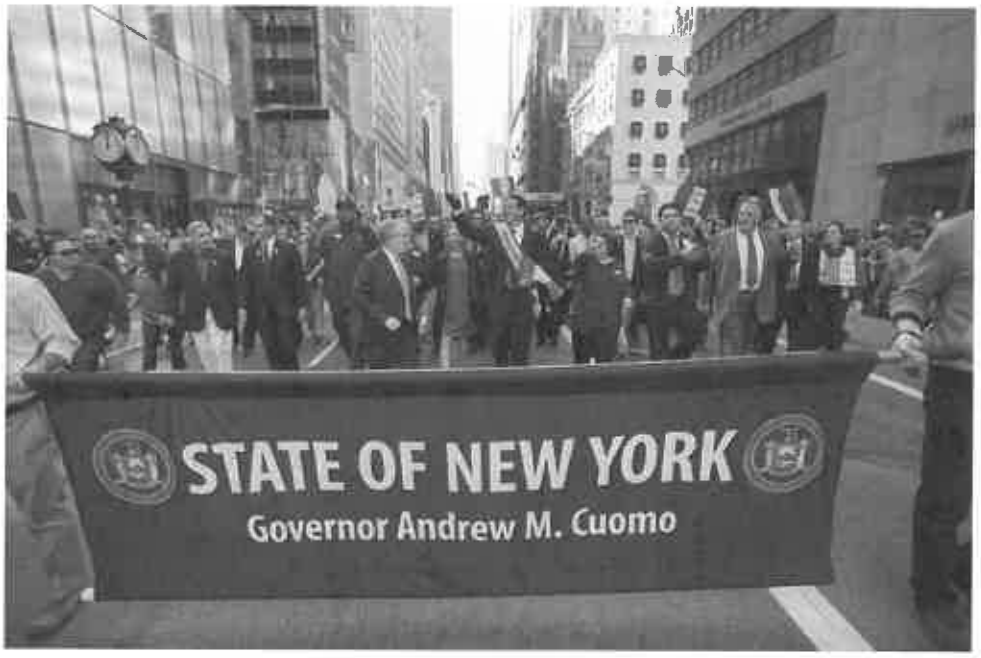
York Law School on 185 West Broadway in Manhattan.

Representatives for each of Albany's three leaders did not respond to requests for comment.

GOVERNMENT

Reform Proposals Fly as Panel Evaluates Ethics Watchdog

by Samar Khurshid, Oct 15, 2015



The governor's office, on the march (photo: Governor's Office via flickr)

The 2011 law that created the Joint Commission on Public Ethics (JCOPE) to be the top ethics watchdog in the state contained a proviso that the body would be periodically reviewed to find ways to improve its functioning. That mandate fell upon the New York Ethics Review Commission, more commonly known as the JCOPE review commission, which held its first-ever public hearing on Wednesday at New York Law School in downtown Manhattan.

The forum was sparsely attended with barely 20 people in the audience including legal experts and good government advocates who suggested ways that JCOPE could become a stronger, more efficient oversight entity. Their recommendations, though diverse, centered on a few core issues that plague JCOPE: the extent of its jurisdiction; the protocol of appointments; transparency in its internal functioning; and its online resources.

Wednesday's meeting. The hearing was in part held as the commission works toward preparing a report due by November 1, though that deadline appears fungible. Commission chair and former state Senator Dale Volker, stated at the outset that the review body's mission is to be an advisory charged with reviewing and evaluating the performance of JCOPE and the legislative review commission.

"We're looking at how well they're performing under current law as it's written and not to redefine the scope of what these bodies are charged with doing or establish new regulatory structure," he said.

Unfortunately for them, and perhaps New Yorkers, this mandate precludes the major recommendations made by Evan Davis and Dan Karson, members of the New York City Bar Association's Government Ethics Committee. They presented a joint report by the City Bar and good government group Common Cause New York titled "Hope for JCOPE."

Davis made it a point to say that the JCOPE commissioners are "very good people who all want to do the right thing and our disagreement with them is about what is the right thing in the circumstances presented today." With hypothetical ethics lessons, he tried to illustrate the legal technicalities and grey areas which JCOPE could address.

Karson focused on JCOPE's controversial appointment process. Of the 14-member commission, eight members are legislative appointees and six are gubernatorial - members come via the very entities which fall under the commission's purview.

"By its very design, the legislation for JCOPE provides that appointments will be made along party lines and in reality precludes membership other than by the two major political parties," said Karson. "Political party affiliation can prevent, effectively, JCOPE in conducting an independent investigation."

He emphasized that the structure and rules of the body allow micro-minorities of two or three members to veto decisions to initiate official investigations into members of legislature, legislative employees and candidates.

"The fact that the party leaders name eight members and political affiliation is a specific qualifier in the gubernatorial appointments creates the appearance of political influence and partisanship," he said.

Karson recommended that the express political test for gubernatorial appointments be eliminated; that the governor's appointments be reduced to four; that legislative appointments be reduced to six; and one member each be named by the state's Chief Judge, the Attorney General, and the Comptroller. Also, he suggested that the commission's size be made an odd number to ensure there can be no deadlock vote in case of full participation.

Karson said there should be firewalls between JCOPE commissioners and public officials who appoint them to prevent any communication. He also specifically addressed the issue of self-dealing by legislators through state-funded non-profit organizations, insisting that JCOPE publish lists of these organizations and prohibit any involvement by legislators, their staff and immediate families.

JCOPE's independence, or lack thereof, was also the focus of testimony by Talia Werber, policy and research manager at Citizens Union, a good government advocacy organization.

management and legislative changes.

Among Citizens Union's proposals are: independent budgeting for JCOPE; investing in database resources and information technology; an open process of personnel selection; making internal workings public and transparent; improving the process of financial disclosure reporting by coordinating with different agencies; reducing response time to complaints; and improved guidance of grassroots lobbying to ensure ethics compliance.

Werber also reiterated Karson's concern over the structure of the commission, calling for a seven- or nine-member body with a reformed appointment process similar to that of nomination and selection of appeals court judges.

Laura Abel, senior policy counsel at Lawyers Alliance for New York, believes that JCOPE's heavy focus on small community-based lobbying organizations diverts resources from more pressing issues.

"I sometimes think of JCOPE as being like a puppy who's so busy yapping at passersby that when the burglar walks in the front door, it's too tired to do anything about it," she said at the hearing.

JCOPE Has been notoriously quiet in terms of exposing high-ranking corruption or major governmental malpractice, even while the drip of indictments by the U.S. Attorney's office continues.

Abel recommended changes to the lobbying disclosure process that would make the commission's job more efficient and make it easier for small lobbying groups to follow the rules.

Part of JCOPE's responsibility is to publicly provide the data it collects. However, it hasn't used the resources at its disposal to do this in the most efficient way. Prudence Katze, research and policy Manager at Common Cause New York, said JCOPE's website is "confusing" and "clunky" and that it needs to be more proactive in rulemaking to "facilitate easier reporting for lobbying entities but also make the data easier to understand."

"JCOPE has the power to shift the pattern of corruption in albany by becoming a proactive force but only if everyone understands the rules and consequences," she said.

In a strange turn of events, the meeting temporarily went off track with the testimony of Elena Sassower, co-founder and director of the Center for Judicial Accountability, Inc. which she described as a non-partisan, non-profit citizens organization focused on New York's "pervasively corrupt" judiciary which is "actively abetted by the executive and legislative branches."

Sassower directed a scathing attack at both JCOPE and the review commission itself in a testimony that devolved into finger-pointing and heated words exchanged with review commission chair Volker. Sassower called JCOPE and legislative ethics commission "corrupt facades" that have protected their appointing authorities from investigation.

She questioned the review commission's methodology and the protocol of dealing with conflicts of interest, stating that they were "unlawfully constituted" and should shut down.

A salient, simple point she raised was that the JCOPE review commission's website is not easy to find since the name changed to the New York Ethics Review Commission.

Although Volker said the commission would not field questions or give responses, Sassower's testimony solicited a defense. He critiqued her for giving false testimony in the past (to which she responded she had never done so intentionally) and that she was simply repeating testimony that was not relevant to the review commission's mandate.

"Our job is not to condemn JCOPE but is to recommend possible change," Volker said.

As the meeting wound down, Volker said the entire panel would meet next week and that they hope to have their report ready by November 1. (Sassower kept volleying parting shots as they left their chairs.)

Although there were no members of JCOPE itself present at the hearing, JCOPE external affairs director Walter McClure said in an email, "JCOPE looks forward to the report of the Ethics Review Commission, which we hope will take into consideration the recommendations made in our February 2015 report."

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by Samar Khurshid, Gotham Gazette
@samarkhurshid

Note: Gotham Gazette is an independent publication of Citizens Union Foundation, sister organization of Citizens Union

Witnesses At Public Hearing Say Ethics Commission Not Living Up To Its Mission

By KAREN DEWITT (/PEOPLE/KAREN-DEWITT) • OCT 15, 2015

Listen
3:45


(http://mediad.publicbroadcasting.net/p/wskg/files
13JimDayCapStock.jpg)

CREDIT JIM DAY / WXXI

A panel commissioned to review practices at New York's troubled ethics commission held its one and only public hearing Wednesday. The board's chair says lack of staff and an excess of paperwork may make it difficult to meet the group's November 1 deadline.

Witnesses told the panel that a website meant to help the public decipher the state's complicated lobbying structure is nearly incomprehensible; its built-in commissioner vetoes of politically sensitive investigations causes it to operate "like no other respected" ethics body; and the near constant closed-door meetings give it the "appearance of obfuscation and shielding."

The panel is tasked with reviewing the state's controversial Joint Commission on Public Ethics (JCOPE).

Yapping Puppy

Laura Able, senior policy council at the Lawyers Alliance likened JCOPE to a "puppy who's so busy yapping at passersby that when the burglar walks through the front door, it's too tired to do anything about it."

JCOPE spends too much time "chasing down information" from small, community-based organizations, said Able, when the information is publicly available elsewhere, thus ignoring larger, more egregious violations.

Self-Dealing

The group has the authority to go after bigger fish, but is not using it said Daniel Karson, member of the Committee on Government Ethics at the New York City Bar Association. 13 state lawmakers have been convicted of crimes or fined for what Karson calls "self-dealing," where legislators set up a not-for-profit in their own names or a family member's name, then directed state funds to the organizations.

JCOPE can ban lawmakers from engaging in outside activities that create the "appearance of impropriety" because they or a family member would personally profit from the arrangement, according to Karson.

"We believe that JCOPE can take direct action now without any enabling legislation, to end this abuse," Karson said.

Illusory Fines

At a time of mounting corruption convictions, which include the indictment of both leaders of the legislature in 2015, JCOPE's number of actual investigations has been low, said Karson. Besides the one exception of a $300,000 fine against former Assemblyman Vito Lopez, accused of sexual harassment, the fines have been "meager" and often directed at small community organizations that don't have the money to pay the fines.

"So these penalties are illusory," said Karson. "And they are not serving as a deterrent to unethical conduct in the state."

Talia Warber, with the reform group Citizen's Union, said JCOPE's website is poorly designed and difficult to decipher, and the commission could use more IT support to upgrade and organize the data it collects from lobbying groups, so the public can be better informed.

"It is a confusing system," Warber said. "It's very hard to do a broad assessment of lobbying activities."

Citizens Union also recommends that JCOPE commissioners make themselves subject to the state's Freedom of Information and Open Meetings Laws and stop doing most of their business in private executive sessions, which makes it look like they are hiding something.

Nov. 1 Deadline

The review panel is due to issue its final report in two weeks, but panel chair and former state Senator Dale Volker cast doubt on that deadline, saying the panel has no paid staff, and is inundated with paperwork.

"I did ask the governor for staff," said Volker. "Because JCOPE in the meantime got three new people. I want to be very honest about it."

A minor controversy was created recently when JCOPE's commissioners learned that the outgoing executive director, a close Cuomo associate, had hired three paid employees for the ethics commission without telling anyone.

Despite all the obstacles, Volker said he's "hopeful" the report will be finished by November 1. At the beginning of Wednesday's meeting, Volker also stressed that the review panel's mission is not to "redefine" the structure of JCOPE, but rather to assess how well the commission is performing.

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CAPITOL CONFIDENTIAL

JCOPE review chairman says he asked Cuomo for staff

By Chris Bragg on October 14, 2015 at 6:43 PM

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The chairman of a panel reviewing the operations of the Joint Commission on Public Ethics said at a hearing on Wednesday that he had asked the Cuomo administration for staffing help on what's supposed to be an independent review.

JCOPE has faced questions during its own lifespan since 2011 about its independence from the Cuomo administration, which may make the statement about the legislatively mandated review panel seeking staffing help from the governor notable. Like JCOPE, the review commission was appointed by Cuomo and legislative leaders.

In the end, according to a review panel spokesman, Cuomo staffers are not helping the review panel.

The review panel began operating in May and its report is due Nov. 1, though its chairman, former state Sen. Dale Volker, expressed concern about hitting the deadline without paid full-time staff at a hearing in New York City on Wednesday.

Volker in tandem referenced the hiring of three former Cuomo staffers by JCOPE's former executive director, Letizia Tagliafierro, as she left for a job in the Cuomo administration in July. Four of JCOPE's legislatively appointed commissioners wrote a letter to the Times Union taking strong issue with the hirings, especially that of the body's new chief of staff and special counsel, Kevin Gagan.

"I asked the governor for staff," Volker said, at the review panel's only public hearing on Wednesday.

"Of course, because JCOPE in the meantime got three new people," Volker added. "So I want to be very honest about it."

At its meeting last week, JCOPE commissioners**rescinded the ability** of the JCOPE executive director to make hires between meetings, as Tagliafierro had done.

Volker could not immediately be reached for comment to clarify the remarks. But in the end, no Cuomo administration staff will be writing the review commission's report or working on it, according to Ariel Dvorkin, a New York Law School official who is serving as a volunteer coordinating the JCOPE review.

"The report is being written by members of the Commission," he said via email. "There is no paid staff, and no government provided staff. The final report will be the work of the Commission with the support of volunteer nongovernmental staff and law students."

Dvorkin added, "Since I was sitting next to [Volker at the hearing] and if I recall correctly, Senator Volker's comment centered on getting a

budget from the State."

It was not immediately clear how the three new hires at JCOPE were related to the separate, eight-member volunteer review panel getting a budget for its operations. Volker may have been saying that if JCOPE was getting more staff, the review commission deserved some as well.

Volker said at the meeting that the commission had attempted to meet with many interested stakeholders in New York's ethics and lobbying world, including in New York City, Albany and Buffalo. The review commission **does not have subpoena power**, which could make reviewing an oft-secretive agency difficult. Still, a number of groups on Wednesday offered suggestions for structural changes to JCOPE, such as doing away with a rule allowing a small minority of the 14 commissions to kill an official investigation.

The whole hearing can be **watched here.** Volker's comments were**first reported** by New York State Public Radio.

The review panel canceled its only Albany hearing that had been set for a week ago, citing a lack of witnesses (Volker said only two had signed up) and an overlap with a long-scheduled JCOPE meeting. The panel was originally set to begin work in 2014, but was delayed until May.

NYC Bar: Delay JCOPE review deadline three months

By Chris Bragg on October 16, 2015 at 5:16 PM

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With a legislatively mandated Nov. 1 deadline looming for a panel reviewing the Joint Commission on Public Ethics to issue its written report, the New York City Bar Association is calling for the deadline to be moved back to Feb. 1, 2016.

"We believe the Review Commission has good cause to request an extension of the current November 1 deadline for report submission set by the Governor and the Legislative Leaders when the Commission members were appointed this past May,"wrote Benton Campbell, chairman of the bar's Committee on Government Ethics, in a letter to members of the review commission. "The November 1 deadline falls well short of the nine month period originally set forth in the enabling statute and, we believe, artificially and detrimentally compresses the time needed to examine the many aspects of JCOPE's mandate and performance. We therefore urge that the Review Commission ask the Governor and the Legislative Leaders to extend the November 1 deadline by three months...thus affording the Review Commission the originally intended allotment of time for the completion of its work".

This could be difficult, however, given that the Nov. 1 deadline was set in this year's budget agreement, which means a special session of the Legislature would likely have to be convened to make the change. The JCOPE review panel does not appear to be an especially high priority for Gov. Andrew Cuomo or legislators, as evidenced by the fact that the eight volunteer commissioners were provided no staff or budget, and instead are running an all-volunteer operation out of New York Law School staffed by law students and coordinated by a

school official. (The review panel's chairman, former state Sen. Dale Volker, says **he unsuccessfully asked** Cuomo for staff. At the review panel's only public hearing held in New York City earlier this week, Volker expressed concern that the review panel, convened May 1, won't be able to hit the Nov. 1 deadline.)

Of course, the JCOPE reviewers could also simply choose to ignore the Nov. 1 deadline mandated in law. Under the original law passed in 2011 creating JCOPE, the JCOPE review panel was originally supposed to be convened on June 1, 2014 and be finished by Mar. 1 2015. But Cuomo and legislative leaders simply ignored the deadlines and gave themselves a new May 1, 2015 deadline to appoint commissioners in this year's budget agreement.

The Bar Association is also pushing for the review commission to suggest legislative changes to JCOPE, not just point out what is or isn't working under current law.

"We believe that JCOPE's reluctance to act on reforms that are already within its power strongly reinforces the need for the more significant structural legislative changes we recommended, and which were summarized in [the Bar's] testimony, to secure JCOPE's enforcement independence in both fact and appearance" Campbell states. "Accordingly, we hope that the Review Commission considers all options, including legislative change, in its review and recommendations."

Appendix G

Press Release Announcing Review Commission Formation and Members

MAY 1, 2015 Albany

Appointments to the JCOPE Review Commission Announced by Governor, Senate and Assembly

Governor Andrew M. Cuomo, Temporary President and Majority Leader of the Senate Dean G. Skelos, and Speaker of the Assembly Carl E. Heastie today announced the appointments of eight individuals to the JCOPE Review Commission.

The Commission is tasked with reviewing and evaluating the activities and performance of the Joint Commission on Public Ethics and the Legislative Ethics Commission. By November 1, 2015, the Commission must issue a report on its review to the Governor and the Legislature, including recommendations on strengthening the administration and enforcement of ethics laws in New York State.

They are:

Anthony Crowell, Dean at New York Law School and former counsel to Mayor Michael Bloomberg, is an expert in state and local government law. He also previously served as Special Counsel to the Mayor and Assistant Corporation Counsel in the New York City Law Department's Tax & Condemnation and Legal Counsel Divisions, and at the International City/County Management Association. Dean Crowell earned a law degree, *cum laude*, from American University and a Bachelor of Arts, *magna cum laude*, from the University of Pennsylvania.

Michael S. Feldberg is a partner at Allen & Overy LLP, where he is the head of the firm's

U.S. litigation practice. He is a former Assistant United States Attorney for the Southern District of New York, and has experience litigating and trying cases in a wide variety of areas, with a special emphasis on the defense of federal criminal and regulatory cases as well as federal civil litigation. He graduated from Harvard Law School, *cum laude*, in 1977, and Harvard College, *magna cum laude*, in 1973.

Seymour James is the Attorney-in-Chief of The Legal Aid Society in New York City. Mr. James joined The Legal Aid Society in 1974 as a staff attorney and has served in various supervisory capacities. He is a member of the New York State Justice Task Force, the Committee on Character and Fitness for the Second Judicial Department, and the New York State Permanent Sentencing Commission, and was recently appointed to Mayor DeBlasio's Task Force on Behavioral Health and the Criminal Justice System. James also serves on the Executive Committee of the State Bar's Criminal Justice Section and on the State Bar's Committee on Leadership Development. He is a member of the Board of Directors of the Correctional Association of New York and the New York State Defenders Association and a member of the Chief Defender Council and the Defender Policy Group of the National Legal Aid and Defender Association. James earned his law degree from Boston University School of Law, and his undergraduate degree from Brown University.

Tony Jordan was elected as Washington County District Attorney in 2013. Prior to becoming district attorney he served in the New York State Assembly for three terms representing parts of Saratoga and Washington Counties. Jordan was a partner in the law firm of Jordan & Kelly LLC, and served as an Assistant District Attorney in Washington County before his time in the Assembly. He earned a law degree from the University of Pennsylvania Law School in 1995 m*agna cum laude*, and received his bachelor's degree from the University of Notre Dame in 1986.

William LaPiana is the Rita and Joseph Solomon Professor of Wills, Trusts, as well as the Estates Director, Estate Planning, Graduate Tax Program for New York Law School, where he has taught since 1987. Prior to teaching, he also served as an associate at Davis Polk & Wardwell in New York. Dr. LaPiana is a Buffalo native who holds both a Ph.D. in History

and a J.D. from Harvard, where he also received his B.A. and an M.A.

Elizabeth Moore is currently Senior Vice President and General Counsel at Con Edison. She was formerly a former partner in the firm of Nixon Peabody LLP, where she specialized in public finance, employment law, procurement policy, and government compliance and regulatory issues. Ms. Moore previously served for 12 years in the administration of former New York Governor Mario Cuomo, and was Counsel to the Governor from 1991 to 1994. Moore earned a law degree from St. John's University and a Bachelor of Science from the School of Industrial and Labor Relations at Cornell University, where she is a member of the Board of Trustees.

Patricia Salkin, Dean at Touro Law School, is a nationally recognized scholar on land use law and zoning. She formerly served as a professor of law, as well as Associate Dean and Director of the Government Law Center of Albany Law School and as an Assistant Counsel for NYS Office of Rural Affairsý. Dean Salkin is co-chair of the NYS Bar Association's Standing Committee on Legal Education and Admission to the Bar. She served two terms as an appointed member of the National Environmental Justice Advisory Council, a Federal Advisory Committee to the U.S. Environmental Protection Agency. Dean Salkin earned a law degree, *cum laude,* from Albany Law School of Union University, and a Bachelor of Arts degree, *cum laude,* from the State University at Albany.

Former Senator Dale Volker represented Western New Yorkers in the State Legislature for over 35 years before retiring in 2010. Formerly a police officer, he was first elected to the New York State Assembly in 1972, and three years later, won a special election to the Senate. During his time as a Senator he served as chairman of the Energy and Codes committees, as well as the Subcommittee on Alcoholism. Senator Volker earned his law degree from the University of Buffalo and his undergraduate degree from Canisius College.

Contact the Governor's Press Office

New York City Press Office: 212.681.4640

Note: Seymour James stepped down from the Commission after its announcement and Christopher Pisciotta was appointed soon afterwards.

Christopher Pisciotta, Attorney-in-Charge, Legal Aid, Richmond County (replacing Seymour James). Before his appointment as Attorney-in-Charge of the Richmond County Office in 2011, Mr. Pisciotta served as a Supervising Attorney at Legal Aid from 2005 to 2011. He has had a long and distinguished career serving in private practice and at several public interest legal organizations. Mr. Pisciotta earned a law degree from The Catholic University of America, Columbus School of Law, and a Bachelor of Science degree from Cornell University.