The Business Council

December 4, 2015

NYS Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207

Dear Commission Members:

I am submitting these comments on the draft Advisory Opinion No.15-OX regarding solicitation of campaign contributions by certain elected officials.

Our principal concern is that the main directive set forth in this draft opinion uses excessively broad language, leaving both elected officials and prospective donors uncertain as to its scope.

Specifically, the draft opinion states, on page one, that, ". . . an elected official running for re-election may not directly solicit or accept monetary or in-kind campaign contributions from any *person or entity which is the subject of the investigative, prosecutorial, or audit power of the elected official or the office of the official* . . ." [emphasis added.]

The intent of this provision is unclear, i.e., what does it mean to be subject to an official's or office's *investigative, prosecutorial or audit power*? As example, the office of attorney general has extremely broad investigative and enforcement authority. Likewise, under Legislative Law §60, a legislative committee can compel the attendance of any witness they care to examine, and under §62-a, a legislative committee chair, vice-chair, or a majority of a legislative committee's membership can issue subpoenas "in reference to any matter within the scope of the inquiry or investigation being conducted by the committee."

These are very broad "investigative" powers and as a result, the universe of entities subject to the investigate *authority* of the attorney general and legislators is almost unlimited.

As such, it is unreasonable for JCOPE to suggest that any entity that is *potentially* the subject of an official's investigative or enforcement authority is prohibited from providing political support to that official.

A more reasonable approach is to apply this restriction only to entities subject to an active investigation, audit or enforcement action, or even more simply, subject to an active enforcement action. This alternative is consistent with Advisory Opinion No. 95-38, whose content is discussed on page 4 of this draft opinion, and which argues that Public Officer Law §74 restricts solicitations or acceptance of contributions from entities that are "the active

subject of enforcement powers." We recommend that this draft opinion be edited to make this a more targeted and limited restriction.

As a final comment, we question the draft opinion's concluding paragraph, which – on page five – states that, "Public Officers Law §74 imposes restrictions on elected officials' campaign activities, *and elected officials must observe the restrictions set forth in this Opinion*." [emphasis added.]

While JCOPE has statutory authority to issue advisory opinions, by statute and practice, advisory opinions are applicable to the entity requesting the opinion. Your web site, at http://www.jcope.ny.gov/advice/, JCOPE confirms this approach by stating, "Formal [advisory] opinions, which are made public, are binding on both the Commission and the individual requesting the opinion in any subsequent proceeding . . . "

Regulatory agencies cannot adopt standards of general applicability that have the force and effect of law through the issuance of advisory opinions, guidance, and similar mechanisms. Any broadly applicable standard should be adopted through a formal rulemaking process, and unless specifically exempted from doing so, this should be done through the process set forth in the State Administrative Procedures Act. In doing so, the regulated community and interested public alike will have a clear understanding of fixed standards of broad applicability.

I appreciate the opportunity to submit these comments on the draft opinion. Feel free to contact us if we can provide any additional information.

Sincerely,