



VIA EMAIL[jcope@jcope.ny.gov]

December 4, 2015

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

**Re: Proposed Advisory Opinion 15-OX, Restrictions on Campaign Fundraising**

Greetings:

NYPIRG commends the Joint Commission on Public Ethics (the “Commission”) for proposing regulation of the political fundraising activities of public officials governed by the Code of Ethics (the “Proposed Advisory Opinion”)—an area in desperate need of reform.

**However, as set forth below we believe the Proposed Advisory Opinion needs to be substantially strengthened and significantly clarified to achieve its intended cleansing effect. As amply demonstrated by the conviction of the former Assembly Speaker this week and the ongoing trial of former Senate Majority Leader, public officials, including legislators, wield a tremendous amount of power. These trials laid bare the cozy relationship between public officials and those who would seek to curry their favor and cultivate their good will. The Commission can and must sharply curtail the fundraising leverage wielded by these powerful public officials to the greatest extent possible to eliminate even the appearance of conflict of interest and restore the public’s trust.**

In the Proposed Advisory Opinion, the Commission describes its proposal and rationale as follows:

The Commission issues this Advisory Opinion upon a reconsideration of the section of Advisory Opinion No. 98-12 which excluded elected statewide elected officials from the larger holding of that Opinion, in order to properly reflect and effectuate the purposes of Public Officers Law §74. (Advisory Opinion No. 98-12, n.2 ¶1). Pursuant to its authority under Executive Law §94(16), the Commission renders its opinion that:

1. Public Officers Law §74 applies to statewide elected officials and members of the legislature in the conduct of their campaign activities. Specifically, 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, or is in litigation adverse to the elected official or the office of the official; and
2. The solicitation or acceptance by an elected official of other, non-monetary, forms of political support must be subjected to a Section 74 analysis on a case-by-case basis in order to avoid a conflict of interest or the appearance of a conflict.

While the policy goal of removing even the appearance of conflict of interest by curtailing the solicitation and acceptance of campaign donations is beyond reproach, the Proposed Advisory Opinion as drafted appears to leave gaping loopholes that threaten to swallow the rule. Moreover, the Proposed Advisory Opinion needs to be consistent and clear in how it articulates the standard of conduct it proposes to apply to those subject to the Code of Ethics. Finally, the Commission should use its jurisdiction over lobbyists and clients to ensure compliance with the fundraising limitations.

For example, it states that its application would be limited to candidates raising funds for “re-election.” So if a sitting attorney general raises money to run for governor, would that be covered by the proposed rule? If not, why not? How about the governor raising money for the state party committee, which could then transfer or otherwise use the money to benefit the governor? The Speaker or the Senate Majority Leader raising money for their conference campaign committees—which reinforce their leadership positions? Campaign contributions to legislators, including committee chairs, who have considerable say over the trajectory and fate of legislation? Campaign contributions from those seeking or having government contracts? All these situations pose the same conflicts of interest issues.

Accordingly, the Proposed Advisory Opinion needs to be substantially strengthened in its scope to cover public officials with campaign committees or who play a role in raising funds for other committees. If a public official seeks a higher or different position, they should not be able to evade the proposal’s reach by virtue of the technical distinction that they are not pursuing “re-election.” In addition, public officials can raise money for other non-election purposes, such as public advocacy campaigns and legal defense funds. Indeed, the very receipt of campaign funds or ability to direct donations inures to the benefit of the official and creates the reciprocal type of relationship that can prove problematic. Moreover, as we’ve seen before, public officials who ultimately do not seek election may leave office in control of substantial campaign war chests—which they can use to wield power in the private sector. With respect to legislators, committee chairs and vice-chairs have investigative, oversight, oath and subpoena powers, as well as those in legislative leadership positions, should be subject to the limitations proposed by the Commission.<sup>1</sup>

Further, the Proposed Advisory Opinion must deem the governor as the officeholder having “investigative” and “enforcement” authority with respect to those subject to the various state agencies that are effectively within the governor’s control. That the governor is not identified as the head of

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<sup>1</sup> Legislative Law section 62-a.

the Department of Financial Services, Department of Health or Department of Tax and Finance, for example, misses the point. These clearly are agencies controlled by and accountable to the governor. As the dominant player in the legislative process, particularly as the constructor of the budget, the fundraising ability of the governor also should be appropriately constrained.

This follows from the thinking in Ethics Commission Advisory Opinion No. 98-12, which is the primary basis for the Proposed Advisory Opinion. In Advisory Opinion No. 98-12, the Ethics Commission in turn relied upon Advisory Opinion No. 97-28, which concerned the permissible political fundraising activities of a state agency supervisor. In referring to the earlier 1997 opinion the Ethics Commission held in No. 98-12 as follows:

“Where, as here, an employee is the supervisor of a unit or units, the prohibition extends as well to any person or entity that has a matter pending before the unit or units for which he is responsible. Such a matter is, at least, indirectly before him, and his personal involvement is always a possibility.”<sup>2</sup>

Applying appropriate limits to the governor as the public official ultimately in charge of state agencies flows from this reasoning.

The language of the Proposed Advisory Opinion also needs to be significantly clarified. For example, the proposal would apply to “direct” solicitations and acceptance of campaign donations. If this is intended to apply only to situations where the public official-candidate *personally requests a contribution, oversees the solicitation or personally accepts the donation*, it is too narrow. It is not only the unseemliness of the public official’s direct involvement, but the *existence* of the donation that creates at least the appearance of conflict. As the public official the campaign committee is designed to benefit, the official’s direct involvement should be imputed—without the ability to make a rebuttable presumption to the contrary. The fact that the proposal would restrict *targeted* mail solicitations underscores this point. Presumably it is not the public official that addresses the envelope, licks it closed and posts it—yet the proposal would restrict the campaign’s ability to do so. This logic needs to be applied across the board and become a bright-line standard: No fundraising from those sources whose fate you have the power to significantly affect.

The Proposed Advisory Opinion should also bar those seeking favors from public officials from “bundling” on behalf of a public official as an end run around any prohibition or restriction on direct fundraising. Lobbyists, clients and those subject to regulation by state agencies often are in a position to and do help raise money for public officials from others who might fall within a definition of an interest “subject to” the public official’s powers. At a minimum the Commission should require disclosure of intermediary fundraising activities by those persons and entities subject to its jurisdiction. Lobbyists and their clients are under the jurisdiction of the Commission and it should use its existing authority to ensure cooperation with the fundraising restrictions in its final advisory opinion.

NYPIRG recommends the Commission *bar donations where possible and limit them to the minimum levels that would pass constitutional muster*. Given New York’s sordid recent history of corruption, a clear foundation for action has been laid. There is precedent for limitations between those with a financial stake in the actions of public officials and those public officials holding the

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<sup>2</sup> New York State Ethics Commission, Advisory Opinion 98-12, p. 4.

requisite powers under the circumstances. Accordingly NYPIRG recommends that the Commission adopt the longstanding “*de minimis*” limit approach applicable to municipal bond traders.<sup>3</sup>

Finally, NYPIRG agrees that the Advisory Opinion should contain donation restrictions for matters that are current, arose in the previous twelve months and for the foreseeable future.

It’s time to stop the charade that campaign contributions from those lobbying state government or subject to its investigatory or regulatory authority, as well as those persons and interests seeking legislative favors, are not “gifts” designed to create good will. The social science literature is replete with studies demonstrating the power of gifts and their ability to create a sense of obligation on the part of the recipient. Indeed, this is why gifts other than campaign donations given by lobbyists and clients are presumptively prohibited under state law.

The Proposed Advisory Opinion should bar campaign donations from lobbyists, their clients and those subject to investigation or regulation or legislative action by the public official. Since the governor controls state agencies, the restrictions should apply to those subject to the investigatory and regulatory reach of those agencies, commissions and authorities. With respect to legislators, the proposal should apply to all lawmakers, but at a minimum those in leadership positions and with the authority to issue subpoenas and oaths. Moreover, as the governor is essential to the legislative process, the governor’s ability to raise funds should be similarly constrained.

The Commission has ventured to address a fundamental problem with business-as-usual in Albany. We urge you to craft a strong, bright-line standard that will accomplish the critically important, laudable policy goals you have articulated.

Sincerely,

Blair Horner  
Executive Director

Russ Haven  
Legislative Counsel

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<sup>3</sup> Municipal bond professionals are effectively limited by Rule G-37 to making no more than \$250 in political donations to the public officials that they can vote for in their individual capacity. See <http://www.msrb.org/Rules-and-Interpretations/MSRB-Rules/General/Rule-G37-Frequently-Asked-Questions.aspx>.