



STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

EXECUTIVE DIVISION

January 22, 2016

Monica J. Stamm  
General Counsel  
NYS Joint Commission on Public Ethics  
540 Broadway  
Albany, NY 12207

Dear Ms. Stamm:

Thank you for providing the Office of the Attorney General with an opportunity to comment on JCOPE's revised proposed advisory opinion, 15-0X. The Attorney General shares JCOPE's goal of minimizing the potentially corrosive effect of money in politics. However, the campaign finance regime that JCOPE has proposed would have little salutary effect, would unfairly target only certain individuals, and would give rise to a number of serious operational problems.

The proposed advisory opinion states that "it is the duty of the Commission to uphold the public interest in avoiding even the appearance that an elected official can or will use the powers of his office to influence prospective campaign donors or that an elected official can be influenced in his official actions by the prospect of a campaign contribution." The advisory opinion falls far short of that goal, in large part as a result of the jurisdictional limitations placed on the Commission by the Legislature. These are constraints that cannot be addressed by further revision of the proposed advisory opinion; meaningful campaign finance reform can only be achieved by the Legislature. The Attorney General has always supported such reform and will continue to do so in this year's legislative session.

The advisory opinion affects the fundraising activities of (1) only incumbent elected officials, and (2) only to the extent that an official exercises enforcement authority. Neither limitation is fair or justified.

1. In a contest for an open seat, none of the proposed regulations would apply to any candidate; in a challenge to an incumbent Attorney General or Comptroller, only the incumbent and not the challenger would be subject to these restrictions, in effect subjecting different candidates to different sets of rules. This raises fundamental questions of fairness.

This asymmetry is not only unfair but also severely limits the efficacy of the proposed new regime. The advisory opinion is aimed at the risk that the public will perceive that a

candidate would let campaign contributions influence his or her official actions if elected (or re-elected). A challenger and an incumbent are not differently situated in this regard. The fact that a challenger is not yet elected does not eliminate the possible perception that a candidate might use the promise of future influence to reap campaign contributions. Likewise, the rationale for requiring recusal based on prior campaign contributions applies equally whether a contribution was received by an incumbent or challenger. A contribution to an incumbent would, under the advisory opinion, require recusal by the incumbent if reelected to office, while the same contribution to a challenger would not require recusal by the challenger if elected to the same office.<sup>1</sup> Moreover, while JCOPE might be able to cure the asymmetry in the recusal rule, by extending it to newly elected challengers, it is likely unable to cure the asymmetry in the restrictions on fundraising, because challengers are not be subject to its jurisdiction before they become public officers. This incurable constraint—the inability to regulate incumbents and non-incumbents alike—is at the heart of the problem with JCOPE undertaking the task of regulating campaign finance.

2. The proposed advisory opinion addresses only “enforcement” activity and entirely ignores myriad other forms of government decision-making that are susceptible to the appearance of improper influence of campaign interests. For example, under the proposed rules, a person or entity doing business with the State—including government contractors and grant recipients—may be solicited to make contributions before, during, and after the contract or grant award process. It is inexplicable that JCOPE has chosen to ignore these “pay-to-play” transactions—activities that are usually a primary target of reform efforts—while targeting only law enforcement activity, which has not generally been identified as an activity that is subject to influence by contributors.<sup>2</sup> Nor does JCOPE address law-making activity, another area that is widely perceived to be subject to influence by contributors. As described by the New York City Bar Committee on Government Ethics, the “Governor would remain free to solicit a contribution from a person or entity seeking a veto” and the Speaker of the Assembly “would be free to solicit a contribution . . . from a person or entity seeking the defeat of legislation under active consideration in the Assembly.”<sup>3</sup>

In short, JCOPE proposes to regulate the campaign activities of only the incumbent Comptroller and Attorney General.<sup>4</sup> Only their campaigns would be monitored, investigated, and

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<sup>1</sup> The New York City Bar Committee on Government Ethics urges that it is appropriate to regulate only the campaign activities of incumbents because the proposed regulations derive from an interpretation of the State Code of Ethics, which applies only to public officers and employees. Letter from Benton J. Campbell, N.Y. City Bar, Committee on Gov’t Ethics, to Joint Commission on Public Ethics (Dec. 4, 2015) at 4. But that is simply evidence that JCOPE was not intended to be a regulator of campaign finance; it does not make the proposed policy changes any less incoherent or unfair.

<sup>2</sup> District Attorneys, who exercise plenary criminal authority in the State, are not subject to limitations such as those in the proposed advisory opinion.

<sup>3</sup> Letter from Benton J. Campbell, N.Y. City Bar, Committee on Gov’t Ethics, to Joint Commission on Public Ethics (Nov. 16, 2015) at 2-3.

<sup>4</sup> Although it is possible to interpret the proposed advisory opinion as applying to the Governor’s fundraising activities to the extent the executive agencies that he supervises have enforcement authority, *see* Letter from Nancy G. Groenwegen, Counsel to the Comptroller, to Joint Commission on Public Ethics (Nov. 16, 2015) at 3, JCOPE’s

possibly subject to enforcement actions by JCOPE. The Comptroller and the Attorney General are the only two elected state officials who do not make appointments to the Commission (either directly or through legislative leaders); targeting them for this new regulatory regime will do little to restore public trust, and could instead damage JCOPE's credibility as a neutral ethics enforcement body.

In addition to the inexplicably narrow scope of JCOPE's proposal, there are serious, practical problems with the proposed rules, as well. Their implementation would require a level of coordination and communication between government and campaign staff that is likely to contribute to, not dispel, the appearance of improper influence in government decision-making. If enacted, it would fall to government staff, not campaign staff, to (i) make determinations about who (if anyone) is the "subject" of investigations;<sup>5</sup> (ii) create a list of individuals and entities who are subjects; (iii) update the list to add and remove "subjects"; (iv) identify a subject's relatives and affiliated entities; (v) review contributions to determine if they can be accepted; and (vi) check whether a new subject is an existing contributor requiring the elected official's recusal. These operations would require diverting resources from the substantive work of a government office to facilitate campaign fundraising.

The Commission's revision to specify that the list would include only those cases in which the elected official, or his immediate state staff, is personally and substantially involved does not alleviate these concerns. Given that the Attorney General and his immediate staff supervise the work of the entire agency, it is not clear whether this revision has any practical impact. As the State Ethics Commission observed, for a supervisor, a matter pending in any unit for which he is responsible "is, at least, indirectly before him, and his personal involvement is always a possibility."<sup>6</sup> To the extent that the revision does have a practical effect—and would allow the Attorney General to fundraise from the subject of an investigation that the Attorney General was not personally involved in—the revision is not responsive to the potential appearance of impropriety. The subject of an investigation is unlikely to know whether the elected official was personally involved in an investigation and is likely to perceive a conflict if solicited by the elected official, even if the elected official has not had any personal involvement in the investigation. Moreover, this revision means that JCOPE's enforcement of the advisory opinion would require an intrusive and unacceptable review by JCOPE of the internal operation and deliberations of the elected official's office.

An equally unpalatable alternative is that government staff create the list—steps (i) to (iii) above—and update campaign staff as necessary when investigations are initiated or concluded. While that would minimize the burden imposed on the government staff to facilitate

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revision requiring personal and substantial involvement of the elected official limits its potential application to the Governor. And individual members of the legislature do not appear to have any enforcement powers that would trigger this advisory opinion; the legislative authority to issue subpoenas and compel testimony is not authority to investigate and prosecute alleged violations of law and does not reside with individual legislators.

<sup>5</sup> This is an awkward determination to ask government employees to make, since the determination serves no purpose other than to identify whether their boss, the elected official, can fundraise from an individual or entity.

<sup>6</sup> Advisory Opinion No. 98-12.

campaign fundraising, it requires sharing confidential information with non-government employees. Sharing such information with campaign employees is inappropriate, and would certainly be perceived as inappropriate.

The choice between these two deeply flawed alternatives is presented only because JCOPE is using indirect and inappropriate means to address legitimate concerns raised by outside contribution limits. The right solution is for the Legislature to dramatically lower contribution limits and close the LLC loophole, thereby ensuring that no one can contribute an amount that would create the appearance—or reality—of improper influence, not just over the Attorney General or the Comptroller, but also the Governor and members of the Legislature. And, of course, legislative action to lower contribution limits does not require further intertwining of the operations of a government office and its holder’s campaign, as would result from the proposed advisory opinion.

JCOPE was not intended to regulate campaign finance activity and lacks the statutory tools to do so properly. Absent any statutory authority to regulate campaign finance directly, JCOPE proposes erecting a set of *per se* campaign finance rules based on the prophylactic standards of Public Officers Law § 74(3)(f) and (h).<sup>7</sup> Subsections (3)(f) and (h) articulate important standards for the conduct of public officers: to avoid conduct that would “give reasonable basis for the impression that any person can improperly influence him” and to “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.” But these prophylactic standards, which an aggressive regulator could interpret as prohibiting much of the activity that is inherent in privately financed campaigns, were never meant to create jurisdiction for JCOPE to become or enforce campaign finance laws or regulations. Indeed, these standards were never meant to be the hooks for any type of enforcement by JCOPE; violations of § 74(3)(f) or (h) do not carry any civil penalty. *See* Public Officers Law § 74(4). In this light, it is perhaps unsurprising that the Commission does not propose to impose equivalent constraints on the Legislature; doing so would highlight the outside sweep of the remedy.

There is also a serious question of whether JCOPE’s proposed recusal requirements are constitutionally sound. The Attorney General and Comptroller are constitutionally elected officers, and a rule requiring recusal of a constitutional officer “implicates separation of powers considerations.” *See Schumer v. Holtzman*, 60 N.Y. 2d 46, 55-56 (1983). Recusal based on the mere appearances runs the risk of needlessly disabling a duly elected constitutional officer from fulfilling his constitutional function and should be avoided.<sup>8</sup> Accordingly, the Court of Appeals has concluded recusal of a constitutional officer should be ordered “only to protect a defendant

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<sup>7</sup> While the opinion also cites § 74(3)(d) as a relevant statutory authority, the prohibitions and prescriptions in the draft advisory opinion go well beyond the text of that subsection, which prohibits only the *actual* use or attempted use of an official position to secure unwarranted privileges; it does not prohibit or impose a penalty based on the potential appearance that unwarranted privileges were secured.

<sup>8</sup> It is easy to imagine a wealthy potential target of an investigation making a contribution to every candidate for Attorney General to ensure that no matter the outcome of the election, the Attorney General will be recused from any future investigation. Recusal in such circumstance does not avoid the impression that the target is getting special treatment; rather, it bestows the target with special treatment based on his prior contribution.

from actual prejudice arising from a demonstrated conflict of interest or a substantial risk of an abuse of confidence.” *Id.* JCOPE’s proposed advisory opinion would require recusal in much broader circumstances.

JCOPE’s proposed advisory opinion is fundamentally unfair and uneven in its application, and will cause practical problems counter to the ultimate goal of restoring public trust in government. The only solution lies with the Legislature. The Attorney General will continue to advocate legislative action on meaningful and comprehensive reforms, including: (1) a prohibition on outside employment of public officials; (2) an increase in legislators’ salaries and extension of their terms; and, most relevant to this discussion, (3) meaningful campaign finance reform, including (a) a dramatic reduction of contribution limits; (b) closure of the “LLC loophole”; (c) the elimination of “housekeeping committees”; (d) the adoption of “pay-to-play” rules similar to the rules that apply in the City of New York; and (e) a system of public matching funds to decrease the importance of larger contributions in campaigns for state office. The Governor has made similar proposals. I would urge the Commission to lend its support to these efforts rather than proceed down the flawed path of the proposed advisory opinion.

Sincerely,



Leslie B. Dubeck  
Deputy Counsel

cc: Daniel J. Horwitz, Chair  
David Arroyo  
Hon. Joseph Covello  
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