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STATE OF NEW YORK
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November 16, 2015

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 State Comptroller with an opportunity to comment on JCOPE's draft Advisory Opinion No. 2015-0X, addressing "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 power." The draft opinion breaks new ground by interpreting the provisions of Public Officers Law §74 that prohibit certain conduct by individual State officers and employees "which is in substantial conflict with the proper discharge of his duties in the public interest" to create new rules for how statewide elected officials conduct the fundraising efforts of their political campaigns. To the extent the draft opinion intends to promote public confidence in government by attempting to address the potentially corrosive effect of money in politics, the effort is laudable. However, we believe the effort fails to address the many practical and legal implications of an elected official's unique dual role as public official and political candidate. For these reasons, we urge continued discussion and thoughtful deliberation in multiple forums on the important question of campaign finance reform before JCOPE acts.

The Holding

The draft opinion is predicated on State Ethics Commission Advisory Opinion No. 98-12, which addressed the ability of State employees to engage in political fundraising on behalf of a candidate for elective office. That opinion barred State employees from soliciting funds (or in-kind contributions) from any individual or business entity: (1) which currently has matters before them or the units they supervise; (2) which they have substantial reason to believe will have matters before them or in such units in the foreseeable future; or (3) has matters before them or such units in the last twelve months; provided, however, they may participate in mass mailings, even if some of the letters reach individuals or business entities from which they otherwise could not solicit funds. Further, the opinion concluded that State employees are barred from using State resources for political purposes, engaging in political activities in a State office, or engaging in such activities during business hours unless leave is taken.

In rendering Advisory Opinion No. 98-12, the State Ethics Commission excluded statewide elected officials from the holding, noting that "[s]uch officials are in a unique position, as they both hold elected office and are simultaneously engaged in political activities. Their fundraising activities are subject to the Election Law." Now, the draft opinion reverses that considered exception, stating simply:

> It is true, as suggested in Advisory Opinion No. 98-12, that elected officials 'wear two hats' when they concurrently serve the public in their official capacity while also seeking political support. This is not, however, a valid reason to disregard the standards of Public Officers Law §74. The ethical standards of conduct carry greater, not lesser importance, when an elected official solicits members of the public for political support.

With no further analysis, the draft opinion then piggybacks on the narrow circumstance described in Advisory Opinion No. 98-12, involving an individual employee, to create a parallel set of restrictions applicable to statewide elected officials and Legislators, holding 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, or is in litigation adverse to the elected official or the office of the official.

<u>The Possible Rationale</u>

The draft opinion does not explain how this novel interpretation of Public Officers Law §74 furthers the statute's objective of promoting public confidence in government, but it appears to be based on the following reasoning:

1. Statewide elected officials, by virtue of their office, oversee various State agencies and departments (many of which possess enforcement powers), and they have the power, authority, and ability to direct how the enforcement powers of the various offices they oversee are exercised.

2. Persons who are subject to these enforcement powers may choose to contribute to the elected official's political campaign for the purpose of influencing how those enforcement powers are exercised. Conversely, persons who are subject to the enforcement powers and who are solicited by the elected official's campaign may feel compelled to contribute, again for the purpose of influencing how those enforcement powers are exercised.

3. Enforcement decisions are to be based on facts and law only, and contributions to an elected official's political campaign should have no bearing whatsoever on those decisions. Further, no person should feel compelled to contribute.

4. Public confidence in government decision making is undermined if decision making is or could be seen to be influenced in any way by political campaign contributions.

5. Therefore, to promote public confidence in government decision making, it is necessary to bar elected officials running for re-election from soliciting or accepting campaign contributions for any person or entity subject to the elected officials' enforcement powers.

The Effect on Governmental Operations

The opinion casts an incredibly wide net over government operations, covering all statewide elected officials and their respective offices and the investigative, prosecutorial and audit powers exercised by those offices. To achieve the outcome intended by the opinion, the covered enforcement activities of the elected official or the office of the official necessarily must include those of all State agencies and departments over which the statewide elected official has the power, authority and ability to influence decision making. Thus, with respect to the Comptroller, it attaches to the covered activities of the Department of Audit and Control and the New York State and Local Retirement System. With respect to the Attorney General, it attaches to the covered activities of the Department of Law. With respect to the Governor, it attaches to the covered activities of all executive branch agencies headed by gubernatorial appointees.

Time and resources do not permit us now to identify all the enforcement activities that would be affected by the opinion, but we can identify the "audit powers" of the Comptroller that would be covered:

- Under Article V, Section 1 of the State Constitution, the Comptroller has the authority to audit all vouchers before payment, the accrual and collection of revenues, the payment of State money or any money under the State's control. In addition, under Article X, Section 5 the Comptroller has the authority to audit public corporations which would include public authorities. As a result, the list of "persons or entities" potentially subject to the audit power of the Comptroller arguably could include, but not be limited to, the following:

    - all State agencies and public authorities
    - all persons/entities with State contracts
    - all persons/entities receiving a State payment (vendors receiving State payments, State employees receiving their salary, persons/entities receiving State tax refunds)

- General Municipal Law §§33 and 34 authorize the Comptroller to examine "the accounts of all officers" and/or the "financial affairs" of: (a) counties, cities, towns and villages; (b) improvement districts, special districts and consolidated health districts; (c) school districts, BOCES, and county vocational education boards; (d) most public libraries and certain library service systems; (e) fire districts and fire companies; (f) municipal urban renewal agencies, industrial development agencies and certain industrial development authorities; and (g) municipal activities having a separate treasurer pursuant to general or special law.

- Education Law §2854(1) (c) authorizes the Comptroller to audit charter schools outside New York City with respect to the schools' "financial operations."

- Article X, Section 5 of the State Constitution authorizes the Comptroller to audit most public corporations other than counties, cities, towns, villages, school districts, fire districts or improvement districts established in one or more towns (e.g., most public authorities established for the benefit of local governments).

While we presume that such far-reaching results are not intended, we trust that the example we have provided plainly demonstrates the need for thorough research and careful consideration of the far-reaching effects of JCOPE's proposed action. We further note that inclusion of the "investigative" powers of an elected official will likely present unique issues related to maintaining and preserving the confidentiality that is essential to a successful investigation.

The Mechanics of Implementation

Beyond our concerns related to the opinion's unintended effects on governmental operations, we raise the following questions regarding the granular application of the described process:

1. The opinion defines the term "elected official" to include the statewide elected officials and State Legislators, "as well as others, such as campaign staffers, who act on the elected official's behalf if the elected official has *actual knowledge* of their activity." What does "actual knowledge" mean? Will all acts of "others" be imputed to the elected official? We note that the Public Officers Law restrictions do not apply to private sector individuals, as campaign staffers are likely to be.

2. Regarding "Subjects"

   a. The opinion refers to any person who is the "subject" of certain government processes and functions. The term "subject" includes the "subject's relative" as defined in Public Officers Law §73(1)(m), which in turn defines "relative" to include "any person living in the same household as the individual and any person who is the direct descendant of that individual's grandparents or the spouse of such descendant." How would anyone know all the individuals meant to be covered?

   b. The opinion further describes the subject of enforcement powers as including the "owner(s) of a corporation or business, the officer(s) of a corporation or business, or any person who has a 'financial interest' in the subject entity." A person has a financial interest in any entity if that person (i) owns or controls 10% or more of the stock of such an entity (or 1% in case of a publicly-traded corporation), or serves as an officer, director or partner of the entity. Again, how would one know all the individuals meant to be covered?

c. Why is there an exclusion for the attorneys of subjects? "Subject" is defined to exclude the subject's attorney, "unless the attorney is also an officer of the corporation or business." While the independent status of an attorney representing a person or entity is appreciated, distinguishing the ability to donate to a campaign on attorney status, when that attorney may be the visible face of the subject to the media and the public during the course of an enforcement action or litigation, seems at odds with the point of this opinion.

3. Timing and Tracking

a. When would the bar apply? Only when the official announces his or her re-election plans? Before the official begins fundraising, which in many cases is before the official actually announces a bid for re-election?

b. The draft opinion sets a moving target for determining when solicitation and/or acceptance of a monetary or in-kind contribution is impermissible to that time where the contributor is an "active subject" of the official's enforcement power. An elected official who receives a contribution from a "prohibited source" (presumably this should read "active subject") must return that contribution, and for twelve months thereafter the official may not "knowingly solicit or accept contributions from the subject." If it turns out that a covered subject contributed to the official's campaign in the previous twelve months, the opinion states that "the official must recuse himself from any participation in the matter." However, recusal "shall not be necessary where the contribution was the result of an indirect solicitation or was unsolicited." How would such recusal work? Presumably, such recusal would also be required of every successful candidate. If, however, the objective of the opinion's campaign fundraising restrictions is to eliminate both actual and perceived political influence in government decision making, and a covered subject contributes to a candidate's successful campaign, how will the candidate-now-public-official's recusal promote public confidence? How will the public even know of the recusal? It would seem knowledge of the recusal would be limited to the staff responsible for exercising the elected official's enforcement power.

c. The tracking required to identify appropriate people or entities from whom to solicit or accept contributions would be difficult to devise and maintain, and it presumes a level of information sharing between the official, the official's agency, and the official's campaign for re-election, which for other reasons, one would not wish to be in place. It would entangle the public employees working for an elected official in the day-to-day details of their fundraising activities and the elected official's political campaign operatives in the day-to-day operations of the public offices the official oversees.

d. How will the operative restrictions be tracked? By whom? Will disclosure of contributions be required beyond what is currently made?

4. Election Law Implications:

   a. If the subject entity is a corporation, New York State Election Law places limits on aggregate contributions annually. However, each affiliated or subsidiary corporation has its own limit. Are affiliates or subsidiaries of subject entities meant to be covered by this opinion?

   b. Limited Liability Corporations (LLCs) have high individual contribution limits. Is the intent to bar subjects from contributing through LLCs to elected officials?

   c. If subjects donate to the political party supporting the elected official, would there be any bar as to whether the party can contribute that amount to the candidates/officials?

   d. The opinion precludes the solicitation or acceptance of "other forms of political support," to be considered on a case-by-case basis (presumably by JCOPE) to avoid the appearance of a conflict of interest. Was this provision meant to cover political support such as an endorsement by a local official of an elected official seeking re-election? Examples of what is meant would be useful.

   e. An anomalous consequence of advancing campaign finance reform through an interpretation of the Public Officers Law (applicable to State officers and employees) is that candidates are not automatically affected. Given that this opinion breaks new ground in the election context, it seems appropriate to subject candidates – individuals who, if successful, become statewide elected officials – to the same rules. Since both incumbents and candidates are otherwise governed by the Election Law's provisions regarding campaign finance, expanding the holding of this opinion would maintain a level playing field for all. Further, since these candidates already file a financial disclosure statement with JCOPE pursuant to Public Officers Law §73-a(2)(a), it would not be an unusual step to impose these restrictions on candidates as well.

Because of these Election Law implications, we trust that JCOPE has or will solicit input and guidance from the Board of Elections.

Commitment to Campaign Finance Reform

Notwithstanding the many questions and concerns the draft opinion raises, there can be no doubt about the undeniable and immediate need for campaign finance reform here in New York State. Comptroller DiNapoli has long advocated for such reform. Throughout his tenure in statewide elected office, Comptroller DiNapoli has been proactive in his efforts to avoid conflicts of interest potentially arising from campaign contributions in the following ways:

- For seven years, Comptroller DiNapoli has submitted campaign finance reform legislation proposals affecting candidates for the nomination for election to the Office of the State Comptroller that offers the option of receiving publicly-funded matching campaign

contributions in return for agreeing to caps on spending, limit on contributions, participating in at least one public debate, and strict monitoring and auditing of campaign expenditures by an independent campaign finance board within the Board of Elections.

- In his capacity as Trustee of the Common Retirement Fund (CRF), the Comptroller has, on more than twenty occasions, advocated successfully for the adoption of corporate governance resolutions calling for the disclosure of (1) a company's policies for making, with corporate funds or assets, contributions and expenditures to (a) participate in any political campaign on behalf of (or in opposition to) any candidate for public office, or (b) influence the general public, or any segment thereof, with respect to an election or referendum; and, (2) monetary and non-monetary contributions and expenditures (direct and indirect) used as in (1), including the identity of the recipient as well as the amount paid to each, and the titles of the persons in the company responsible for the decision.

- Pursuant to a rule of the Securities and Exchange Commission (SEC), an investment adviser is precluded from doing business with the CRF subject to stringent penalties if, among other things, it or certain of its employees has made an impermissible political contribution to the State Comptroller or to a candidate for the State Comptroller within the previous two years. A similar prohibition had been adopted previously for the CRF by the Comptroller pursuant to an "Executive Order and Interim Policy on Political Contributions." That Executive Order and Interim Policy, by its terms, expired and was superseded when the SEC rule was adopted.

- While not specifically related to political contributions, to further preserve the integrity of the CRF, the Comptroller has adopted Placement Agency Policies and Procedures designed to prevent conflicts of interest or the appearance of conflicts of interest in CRF's investment decision-making process. All investment managers must comply with these policies and procedures, which prohibit the CRF directly or indirectly from engaging, hiring, investing with, or committing to, an outside investment manager that is using the services of a placement agent, registered lobbyist or other intermediary to assist in obtaining investments by the CRF, or otherwise doing business with the CRF, whether compensated on a flat fee, a contingent fee, or any other basis.

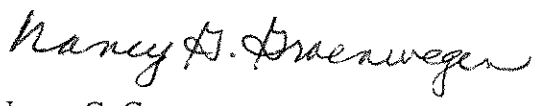
- The Comptroller has issued an executive order providing that "[n]o OSC employee may make or offer to make any monetary contribution to the campaign of the Comptroller, or to any political campaign committee organized by or for the specific benefit of the Comptroller."

- The Comptroller will not accept any contribution from any person or entity responding to a Request for Proposals (RFP) for legal services on behalf of the Common Retirement Fund from the date the RFP is issued until the ninetieth day after the contract resulting from such a RFP goes into effect.

In closing, we believe the draft opinion is well-intentioned and applaud JCOPE's effort, but believe the objectives are far from accomplished. That said, the Comptroller shares JCOPE's commitment to promoting public confidence in government and trusts that the comments we have

offered advance that effort. If you wish to discuss these comments further, please feel free to contact me at your convenience.

Very truly yours,



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