

Dear Mr. Sande:

The NYS Office of Children and Family Services (OCFS) has carefully reviewed the Joint Commission on Public Ethics' (JCOPE) regulatory proposal with respect to outside activity restrictions. Preliminarily, we are pleased that this Notice of Proposed Rule-Making addresses most of the informal comments OCFS provided to JCOPE on January 27, 2015. OCFS offers the following additional comments for your consideration (reference is made to the proposed regulatory citations):

- 19 NYCRR 932.5(a): OCFS suggests the proposed regulation regarding holding elected or appointed public office clearly articulate whether the approval requirement pertains to non-partisan positions (e.g., school boards, library boards, zoning boards, civil service commissions etc.)
- 19 NYCRR 932.5(a): With respect to service as a Director or Officer of a not-for-profit entity where compensation will not exceed \$999 annually, OCFS recommends that the approval of the Approving Authority be required, so that the Approving Authority could determine whether the requested service is acceptable or constitutes a conflict/appearance of a conflict of interest or is otherwise unacceptable to the Approving Authority. (As currently drafted, the proposed provision only requires the employee to notify the Approving Authority.)
- 19 NYCRR 932.6(a)(2): Does this regulatory provision (“The interpretations of the Approving Authority of the Public Officers Law shall not be binding on [JCOPE]”) create an administrative appeal right for employees whose request(s) to engage in outside activities are subject to Approving Authority approval only and are denied by the Approving Authority? Would JCOPE conduct any such hearings? If that is not the desired intent, it is suggested that 19 NYCRR 932.6(a)(2) be moved to 19 NYCRR 932.6(d) so that it applies to those scenarios in which both Approving Authority and JCOPE approval are required.
- 19 NYCRR 932.9: As discussed, this provision, requiring certain boards or councils to adopt a Code of Ethics and file the same with JCOPE applies to only those councils or boards comprised of uncompensated State employees who have been designated as “Policy Makers.” Thus, it does not apply to OCFS boards or councils, such as the OCFS Advisory Board or the OCFS NYS Commission for the Blind’s Executive Board. It is respectfully suggested that JCOPE issue guidance regarding those entities to which the provision applies, to facilitate compliance with the provision.

Please let me know if you have any questions or wish to discuss. Thank you for the opportunity to comment.

Toni G. Koweek
Associate Attorney & Agency Ethics Officer

To: Joint Commission on Public Ethics

From: Barbara F. Smith, Special Counsel for Ethics

Subject: Proposed Title 19 NYCRR Part 932 – Outside Activities Regulations

On behalf of the Office of the State Comptroller, I submit these comments regarding the proposed rulemaking on Outside Activities, 19 NYCRR Part 932. The regulations provide guidance for Policy Makers, heads of State agencies and Statewide Elected Officials.

Among the substantive changes are

1. the addition of a requirement that Policy Makers must disclose to his or her agency service as a board member of a not-for-profit entity, regardless of compensation received;
2. the addition of a requirement for persons to report annually if they are still engaged in an approved outside activity; and,
3. the raising of the monetary threshold that triggers reporting from \$4,000 to \$5,000 annually.

Compliance with the final regulations will take effect upon adoption.

Regarding the first noted change, a salaried Policy Maker would be required to notify his or her Approving Authority prior to commencing service as a director or officer of a not-for-profit entity where he or she will receive compensation less than \$1,000 annually. The regulations are not clear regarding whether the Approving Authority may disapprove such service (particularly since, if annual compensation exceeds \$1,000, the Approving Authority's approval is required). It is fortunate that many Policy Makers are involved in their community, as expressed through holding leadership roles in not-for-profit entities. However, not all affiliations by Policy Makers with not-for-profit entities are free from conflicts of interest with a Policy Maker's duties. Many such entities do business with, are regulated by, are licensed by or funded by various State agencies. Therefore, the regulations would be improved with a clarification that the Approving Authority has a role in reviewing – including the authority to disapprove – a Policy Maker's service as a director or officer of a not-for-profit entity, even where compensation is less than \$1,000.

The proposed annual notice of continued outside activity seems appropriate and feasible to accomplish. The initial development of a system for annual tracking of outside activities may prove to be a challenge, but on balance the result would be worthwhile.

I note that proposed 932.3 “General Standard for all Persons Subject to Public Officers Law §74” states: “[n]o individual *who is subject to Public Officers Law §74*, shall engage in any outside activity which interferes or conflicts with the proper and effective discharge of such individual's official State duties or responsibilities” (emphasis added). I note that §74, by its terms, includes members of the Legislature and legislative employees in its coverage, but the

regulations do not address those categories of persons. I suggest that if the regulations are meant to cover only Executive Branch-related individuals, that such an amendment be made.



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June 8, 2015

VIA E-MAIL AND FIRST CLASS MAIL

Mr. Michael E. Sande
Associate Counsel
NYS Joint Commission on Public Ethics
540 Broadway
Albany, NY 12207

Dear Mr. Sande:

On behalf of the New York State Public Employees Federation, AFL-CIO ("PEF"), please accept these comments regarding the New York State Joint Commission on Public Ethics' ("JCOPE") proposed notice in the April 22, 2015 New York State Register to amend Part 932 of Chapter 19 of the *New York Code of Rules and Regulations* ("NYCRR").

PEF is a union that represents 54,000 State employees in the Professional, Scientific, and Technical bargaining unit, including employees who are subject to JCOPE's regulations in Part 932 either because their salary is greater than that of the job rate of a grade 27 (currently approximately \$91,000) or they have been determined by their appointing authority, on an annual basis, to be holding a policy-making position. *POL* §73-a(c)(ii). As explained below, PEF urges that JCOPE not extend certain substantive and procedural reporting requirements with respect to outside activities to these impacted PEF members.

PEF's overall rationale for its objections to the proposed regulations is that since there is an absence of a compelling governmental reason for the rules concerning disclosure and approval of outside activities for impacted PEF members, these proposed rules which infringe on the privacy rights of those members should not be adopted. PEF members who have been designated as policy makers by their agency (and not pursuant to law nor any clearly established standard) and who are clearly not managerial employees, and who do not serve in a confidential capacity to any managerial employees, should not be subject to such disclosure with respect to their off-duty activities. Such requirements might be appropriate for State officers, elected officials, and judicial officers who are covered by the express language of *POL* §73-a and who have high level policy-making authority and discretion in order to ensure public trust and confidence that policy is being made for the good of the public and not because of affiliations with certain organization. However, there is no such similar governmental interest with respect to impacted rank and file PEF members who do not control public policy or have comparable authority over public policy like State Commissioners and similarly placed individuals. The new requirements with respect to reporting, which require disclosure of private information regarding an impacted PEF members' off-duty, outside activities, may chill, or discourage members from

exercising their right to engage in such activity because the agency and potentially the general public would have access to that information. Therefore, we submit that in the absence of a compelling government interest to impose the proposed enhanced reporting requirements on affected PEF members, JCOPE should not adopt the below regulations and infringe the rights of PEF members and similarly situated State employees.

I. JCOPE should not expand substantive reporting obligations for policymakers.

PEF strongly opposes the two substantive expansions proposed by JCOPE to the reporting and approval obligations of affected PEF members with respect to their outside activities involving service with for-profit and not-for-profit entities.

First, current 19 *NYCRR* §932.3(e) provides that "No individual who serves in a policymaking position on *other than a nonpaid or per diem basis* . . . shall serve as a director or officer of a for-profit corporation or institution without, in each case, obtaining prior approval from the State Ethics Commission." (emphasis added.) Thus, the current regulations do not require employees in policy-making positions to either provide notice or otherwise gain approval in order to serve as a director or officer of a for-profit entity where they are unpaid or are compensated on a per diem basis.

In contrast, proposed Section 932.5(a) would require employees designated as policymakers serving as a director or officer of a for-profit entity to obtain the approval of the Commission "regardless of Compensation." This represents an unnecessary and overbroad expansion of reporting obligations of impacted PEF members. Such expansion only serves to chill a PEF member's right to engage in uncompensated or nominally compensated service at for-profit entities and in the absence of a compelling government reason to do so, this change should not be adopted.

Second, previously, the regulations did not require disclosure or require policymakers to obtain approval to provide a service to a not-for-profit entity, where they were not otherwise obliged to report under other regulations – namely, where they did not otherwise have to get approval because of the amount of their earnings or other compensation.

In contrast, proposed Section 932.5(a) would require, where it was not previously required, that policymakers serving as a director or officer of a not-for-profit entity who make between \$0 and \$999 annually provide the appointing authority with written notice prior to commencing such service. The fact that the proposed regulation would not even require approval by JCOPE, merely notice to the appointing authority, highlights the lack of a concern regarding conflicts between such outside activity and employees', including PEF members', not just limited to PEF members state job. Further, the requirement to provide written notice to the appointing authority nevertheless serves to chill the rights of impacted PEF members to serve as a director or officer of a not-for-profit entity. Stated simply, this new disclosure requirement, particularly for PEF represented employees, unnecessarily invades privacy rights and may chill their participation in certain groups. PEF strongly opposes the expansion of approval and

Mr. Michael E. Sande
June 8, 2015
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reporting obligations discussed above in the proposed regulations as they would apply to PEF-represented employees in policymaking positions because of the lack of a sufficient justification for doing so.

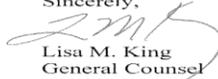
II. JCOPE should not expand procedural reporting obligations for policymakers.

PEF also strongly opposes the expansion of procedural reporting and approval obligations for PEF-represented policymakers.

While the current regulations require employees in policymaking positions to provide a written request when they are obliged to seek approval to engage in an outside activity, proposed Sections 932.6 and 932.7 would require such individuals to provide written request and to also fill out an "Outside Activity Approval Form." Proposed Section 932.7 would require individuals to re-request approval where a material change in the individual's State responsibilities or in the outside activity has occurred. Further, individuals who already have approval or have already provided notice of not-for-profit board service would be required to provide annual written notice to the Approving Authority if the individual was still engaged in the activity.

Proposed Section 932.7 would require impacted individuals, including PEF-represented policymakers, who already have approval to engage in an outside activity or who have already provided notice of required not-for-profit service to provide an annual written notice to the Approving Authority if the individual is still engaged in the activity. Moreover, proposed Section 932.7 would require such individuals to gain re-approval for an activity for which they have already received approval when their duties change materially either in their State responsibilities or the outside activity. Again, the added procedural reporting obligations imposed on such employees place additional burdens on them that potentially chill and discourage such individuals from engaging in outside activities. In particular, the obligation placed on impacted PEF members to provide annual written notice of not-for-profit service is unnecessarily invasive, where approval for such an activity is not even a requirement under the regulations. Overall, the additional, procedural reporting and notice obligations placed on such employees are overly burdensome and further discourage PEF-represented individuals from exercising their right to engage in outside activities that do not otherwise violate their legal obligations under the *Public Officers Law*. Again, given the absence of a compelling reason to do so, the proposed changes addressed above should not be adopted.

Sincerely,



Lisa M. King
General Counsel
NYS Public Employees Federation, AFL-CIO

LMK/scm

cc: Susan M. Kent, President (via e-mail only)
Patricia Lavin (via e-mail only)

From: Sandra M. Casey
Deputy General Counsel

Subject: SUNY's comments on the Proposed Amendments to the Outside Activities Regulations (19 NYCRR Part 932)

To: The Joint Commission on Public Ethics, regs@jcope.ny.gov

On January 30, 2015, the SUNY Office of General Counsel sent a communication the Joint Commission on Public Ethics (the "Commission" or "JCOPE") to offer informal comments on the proposed amendments to the current "Outside Activity Regulations" (19 NYCRR Part 932). On April 22, the Joint Commission on Public Ethics (the "Commission" or "JCOPE") sent a communication to State Agencies, Ethics Officers, and others on the Ethics listserv to announce the amendments to the current "Outside Activity Regulations" (19 NYCRR Part 932) that were published in the State Register, and to solicit public comments. This communication will serve as the SUNY Office of General Counsel's public comments for consideration. Since SUNY policy-makers across the SUNY System will be affected by the changes to the regulations, the SUNY Office of General Counsel, on behalf of SUNY, has reviewed the regulations and prepared comments for consideration. Please note that many of the comments mirror those made in January, as we wanted to be sure we responded in the formal public comment period as allowed pursuant to the State Administrative Procedure Act.

We thank you for the opportunity to offer these formal comments, and appreciate ongoing and the continued opportunity to provide feedback through less formal means, by way of the meetings held by the Commission and informal comments.

As a general note, we want to stress the continuing need for simplicity and consistency in regulatory language. We share JCOPE's goal of minimizing the number of ethical violations and believe we are all better served by more New York State employees being in compliance, and with fewer requirements for SUNY and Commission action. The definitions and requirements for honoraria and financial disclosure in this and other regulations should be harmonized to alleviate confusion and strengthen compliance. Further, we urge the Commission to consider the plainest and simplest language possible, to best inform our employees on their ethical responsibilities.

With that preface, we offer the following numbered comments to the Commission for consideration.

1. Outside Activities should be clearly defined.

The term "outside activities" is not clearly defined anywhere within the current regulations or the new proposed regulations, nor is it distinguished from the current definition of "honoraria." As a result, it is difficult for employees to differentiate between outside activity and honoraria, and understand the nuance of each term's meaning. It would be helpful if the term "outside activities" was defined in the definition section of the new regulations, to offer clarity on what is contemplated by the Commission when the term is used.

The absence of a definition from the regulations has resulted in employees construing the terms "outside activity" as any job or political position outside of the official state duties of the policy maker. In some instances, this even includes participation in other non-work related activities, such as a golf league, Rotary club, service organization, or any other "activity" that a policy-

maker engages in outside of his or her State policy-making role. The Commission cannot have intended such a result.

In the SUNY context, the clinical faculty at each school of medicine and dentistry and the College of Optometry are required to participate in a Plan for the Management of Clinical Practice Income under Article XVI of the Policies of the SUNY Board of Trustees (8 NYCRR Part 340). Income produced through clinical activities (considered part of the faculty member's teaching responsibility) is distributed through private medical service groups. Insofar as this activity is required as part of the employee's duties, it is unreasonable to consider this to be an "outside activity." However, it produces income for the employee outside of his or her SUNY salary. Therefore, any definition of outside activity should allow for this circumstance.

We request that the definition, at a minimum, reflect the current roles listed on the reporting form for an outside activity. As such, a potential definition is as follows:

Outside activity shall mean:

- (1) holding an elected or appointed public office, such as mayor or an uncompensated Town Board member; or
- (2) holding public employment from which the person would receive more than \$5,000 annual compensation or the per diem amount provided to such position; or
- (3) private employment, engaging in a profession or business or other outside activity from which \$5,000 annual compensation would be received; or
- (4) serving as a director or officer of a profit-making institution; or
- (5) any other outside activity role where more than nominal compensation would be offered in exchange for service, or where the employee engaging in the outside activity would have influence over a company, not-for-profit, LLC, or other business venture.

We are extremely pleased with the new the chart format in 932.5 which is offered to show the various forms of outside activities, and the reporting that flows from those activities for policy-makers, Heads of State Agencies, and Statewide Elected Officials. This chart clearly depicts when our SUNY policy-makers have a reporting obligation, and when their activity requires approval. While we would like a formal definition of “outside activities” to be offered, the chart gets a step closer in showing the types of activities that the Commission considers as “outside activities.”

It would be helpful if a chart were also made to show when FDS filers who are non-policy makers have reporting obligations and required approvals based upon their outside activities. Even if the chart shows that an FDS filer who is not a policy maker had no obligation to report or request approvals, it would add more clarity to the issue of if, and when, an FDS filer has an obligation to report.

2. Requirement for Approval for Outside Activities by both the Commission and the applicable State Agency is unnecessarily restrictive and creates significant delay for outside activity participation.

The requirement for policy-makers to seek the approval of both the Commission and the State Agency for which their outside activity work generates more than \$5,000 causes potential undue delay. The State Agency should have ultimate discretion, or at least discretion up to a higher threshold, to determine whether an outside activity by a policy-maker is appropriate, or whether such outside activity causes a conflict of duties.

We offer an example to show how this delay could penalize the policy-maker:

A policy-maker, who happens to be an Associate Vice Chancellor at SUNY, is offered \$6,000 to teach a night course at an unaffiliated university. The offer comes in mid-August for a class that begins September 1. Requiring that both the State Agency’s ethics officer, and then the Commission, make independent determinations about whether or not this outside activity is appropriate and allowed under the rules may take far longer than the few days in which the employee can accept or decline the offer. As a result, the employee may be prevented from engaging in an activity that is ultimately deemed to be appropriate, and subsequently approved (or may decline to pursue it due to the bureaucratic requirement).

We encourage the Commission to draft the regulations such that the State Agency has discretion to determine what is, or is not, appropriate outside activity participation for their policy-makers (subject, to the requirements found in the Public Officers Law). The requirement that all outside activities which include compensation over \$5,000 be approved by both the State Agency and the Commission is unduly bureaucratic, and could frustrate the opportunity for employees to engage in potentially beneficial outside activities that advance the community, resulting in a missed opportunity for policy-makers.

Our recommendation would be that the Commission either:

- (1) Forgo JCOPE approval altogether, and allow the State Agency to determine if the outside activity is appropriate, with an appeals process to the Commission if the employee disagrees with the State Agency determination that the outside activity is a conflict and not allowed, as well as an ability of the Agency to request advisory opinions from JCOPE, or
- (2) Raise the threshold by which JCOPE must approve outside activity positions by policy-makers to *at least* \$30,000, so that JCOPE is only burdened to review claims when a substantial financial interest is at stake, and also allow the State Agency to refer specific issues to JCOPE for determination when, despite a lower compensation, the State Agency is unsure about whether or not the outside activity would pose a conflict.

3. Comment on Requirement of Disclosure of Not-For-Profit Board Service Regardless of Any Compensation

The proposed amendments would require covered persons who serve on a board of a not-for-profit entity to notify their agency of such service even if they are not receiving compensation for this activity. Currently, the regulations require approval by the agency if the covered person is receiving at least \$1,000 a year in compensation for the board service. We believe that the current reporting structure is sufficient and that there is no need to have notice when our employees are sitting on a not-for-profit board receiving no compensation, or compensation with a value less than \$1,000. We are unsure of what this heightened reporting is attempting to detect, and we would not have any recourse if we object to the Board position after learning of the participation.

4. Comment on Approval Procedures outlined in 932.6.

The proposed amendment section on “Approval Procedures” does not offer any time frames of how far in advance approval should be sought, or how long a requestor can reasonably anticipate a response to their request for approval. We have indicated previously that we are concerned that any required approval by the Commission could cause undue delay that could impact the employees’ ability to participate in an outside activity. Establishing some measure of time expectation within the regulations would help to allow employees to understand how far in advance they should seek approval, and when they can reasonably expect to receive an answer on their request for approval.

In addition to our comments on the current regulations being proposed, we offer the following comments on the existing regulations.

The definition of honoraria needs to be more clearly defined.

The current definition of honoraria is vague and overly broad.

Any payment, which may take the form of a fee or any other compensation, made to a Covered Person in consideration for a service performed that is not part of his or her

official duties. Such service includes, but is not limited to, delivering a speech, writing, or publishing an article, or participating in any public or private conference, convention, meeting, or similar event. Honorarium shall also include expenses incurred for travel, lodging, and meals related to the service performed.

A covered person is defined broadly as an employee, whether an FDS-filer, policy-maker, or neither. Therefore, all employees, regardless of filing or policy status, are required to report “[a]ny payment, which may take the form of a fee or any other compensation...in consideration for a service performed that is not part of his or her official duties.”

Given this broad definition, all employees are required to report any duty they perform in consideration for a fee or any other type of compensation, regardless of whether or not this duty/fee is in any way related to their official State duties. Some examples of employees and "honoraria" as currently defined, which fall under this definition:

- o A security guard for a State Agency, on his own time, shovels his neighbor's driveway each time it snows, in exchange for homemade food.
- o A secretary babysits on weekends in exchange for an hourly wage.

We are aware that the Commission contemplated articles, speeches, and presentations when it wrote the definition for honoraria, but the “not limited to” language results, perhaps inadvertently, in the two examples falling within the definition. Further, given that compensation need not be monetary, there are potentially many employees who would accidentally violate the plain language while acting in an ethical manner. As such, we have had a hard time making determinations about whether particular activities are “honoraria” given the current definition, the plain meaning of “honoraria,” and how past definitions have clarified its meaning.

In addition, in the academic context, it is often difficult to determine whether a particular activity is “not part” of the employee's official duties, and, for faculty, whether or not a particular topic falls within the subject matter of their official academic discipline. Consider, for example, the professor of bioethics who is asked by her church to speak on assisted suicide at a congregation lecture. She is compensated or reimbursed for this activity. On the one hand, this lecture is not part of her official duty in that she is giving the talk in a non-employment context. On the other hand, she has been asked to give this particular lecture because of her professional expertise in this subject and, as well, she may consider this talk to be part of her professional activities for purposes of consideration for promotion and career advancement.

In closing, we would like to thank you again for the opportunity to provide feedback.

CITIZENS UNION OF THE CITY OF NEW YORK

Comments on Proposed Amendments by the Joint Commission on Public Ethics (JCOPE) to the “Outside Activity Regulations” (19 NYCRR Part 932)

June 5, 2015

Presented below are Citizens Union’s comments on final proposed amendments to 19 NYCRR Part 932. Citizens Union is a nonpartisan good government group dedicated to making democracy work for all New Yorkers. We serve as a civic watchdog, combating corruption and fighting for political reform.

Having provided informal comments on draft proposed amendments to Part 932 in January 2015, we would like to thank JCOPE for addressing Citizens Union’s recommendation regarding restrictions on political activities. Specifically, we are pleased that the term “district leader” was retained to ensure that it is clear to state policymakers that holding this commonly held political position is prohibited.

Regarding Citizens Union’s other recommendations made in January, we reiterate them below, and encourage their inclusion in the final regulations.

Amendment of 932.5

Citizens Union continues to recommend that JCOPE be notified when an Appointing Authority approves a policy maker’s outside income of between \$1,000 and \$5,000. This notification, while not affecting the decision, would help ensure that JCOPE has a complete record of information about outside income.

Similarly, Citizens Union recommends that JCOPE be notified when an Appointing Authority is notified by a policymaker of outside income under \$1,000.

Amendment of 932.6

Citizens Union continues to recommend retaining the previous Part 932.6. The statement that any person may file a complaint, and the grant of authority to JCOPE to conduct an investigation and to take such action as it deems proper may exist elsewhere in the law and regulations, but bears the clear reiteration it currently gets here.

We appreciate the opportunity to provide feedback.

Via E-mail to regs@jcope.ny.gov

Re: Outside Activity Regulations

Dear Members of the New York State Joint Commission on Public Ethics:

I am general counsel to the New York State Bridge Authority (hereinafter “NYSBA”). The Board of Commissioners (hereinafter “BOC”) is the governing board to NYSBA. The BOC consists of seven members appointed by the Governor and confirmed by the Senate. These are non-compensated appointments with five-year terms of service. The BOC would be considered policy makers under both the current and proposed rule 932.2.

After reviewing the proposed changes and additions to the above regulations, in my view, some of the provisions adversely affect the NYSBA members of the BOC in that it unduly imposes an equal standard of compliance with these regulations with their paid counterparts. Further, in applying these rules in this manner, it seems that the Commission is no longer willing to “give recognition to the special nature of these boards” as stated in New York State Ethics Commission Advisory Opinion No. 98-07 (hereinafter “AO 98-07”). See NYS Ethics Commn. AO 98-7, entitled “Application of Public Officers Law § 74 to members of New York State advisory boards.” Consequently, I am deeply concerned that by subjecting non-compensated members of advisory boards to such an exacting standard, it will make it difficult to attract and maintain participants, who will be willing to serve on such boards without being paid for their time and expertise.

In AO 98-7, the New York State Ethics Commission (hereinafter “the Commission”) opined that “[a]lthough advisory boards are subject to [Public Officers Law §§ 73-a and 74] the Commission realizes that it cannot treat their members as it does officers and employees who exercise final decision making authority. Their different role in the functioning of government, limited to acting as unpaid advisors, must be recognized.” Id.

Moreover, in this opinion, the Commission was careful to note that “Public Officers Law § 74 does not prohibit officers of an advisory board from having interests in all activities that have the potential for creating a conflict of interest. The section prohibits interests or activities which are ‘in substantial conflict with the proper discharge’ of an officer’s duties.” Id. The Commission went on to clarify that the risk of a member’s activities or interests will substantially conflict with the proper discharge of their duties when “the decisions of an advisory board invariably become the decisions of the agency.” Id. However, it further pointed out that the risk of conflict is less substantial “where advisory board decisions merely inform a policymaker’s decisions.” Id.

The proposed outside activities regulations seemingly lose sight of the fact that the issue for non-compensated policy makers is not whether they have *any* conflict of interest that interferes with the proper and effective discharge of such individual's official State duties and responsibilities; but rather, it is whether that conflict is "*substantial*" as contemplated under Public Officers Law § 74 and recognized in AO 98-7. In review of the proposed outside activities regulations, there also appears to be no analysis as to whether the decisions of nonpaid advisory board members like the NYSBA BOC, "invariably become the decision of the agency" or they "merely inform policymaker's decisions" in the assessment of whether a substantial conflict of interests can arise in the members outside activities as aptly considered by the Commission in AO 98-7.

The Proposed Rule under Section 932.3

Specifically, the proposed rule under Section 932.3, entitled "General Standard for All Persons Subject to Public Officers Law Section 74" states that "No individual who is subject to Public Officers Law § 74, shall engage in any outside activity which interferes or conflicts with the proper and effective discharge of such individual's official State duties and responsibilities."

The current rule under Section 932.3 in the regulation is entitled "Restriction on holding other public office or private employment or engaging in other outside activities." This rule, as it stands, is as follows:

(a) No covered individual shall engage in any outside activity which interferes or is [in] conflict with the proper and effective discharge of such individual's official duties or responsibilities.

(b) No individual who serves in a policymaking position on other than a nonpaid or per diem basis, or who serves as one of the four Statewide elected officials, shall hold any other public office or public employment for which more than nominal compensation, in whatever form, is received without, in each case, obtaining prior approval from the State Ethics Commission.

(c) No individual who serves in a policymaking position on other than a nonpaid or per diem basis, or who serves as one of the four Statewide elected officials, shall expend time or otherwise engage in any private employment, profession or business, or other outside activity from which more than nominal compensation, in whatever form, is received or anticipated to be received without, in each case, obtaining prior approval from the State Ethics Commission.

(d) No individual who serves in a policymaking position on other than a nonpaid or per diem basis, or who serves as one of the four Statewide elected officials shall expend time or otherwise engage in any private employment, profession or business, or other outside activity from which more than \$1,000 but less than nominal compensation, in whatever form, is received or anticipated to be received without, in each case, obtaining prior approval from his or her approving authority.

(e) No individual who serves in a policymaking position on other than a nonpaid or per diem basis, or who serves as one of the four Statewide elected officials shall serve as a director or officer of a for-profit corporation or institution without, in each case, obtaining prior approval from the State Ethics Commission.

It appears that this proposed rule is completely replacing the existing rule. Further, under the present rule, the above subsections (a)-(e) did not pertain to nonpaid policymakers. This new rule enunciates the general ethical standards concerning outside activities of those individuals that are subject to Public Officers Law § 74.

This proposed rule completely disregards the standard that was established in AO 98-7 for how Public Officers Law § 74 should be applied to advisory boards that are not compensated in that it fails to recognize that under that opinion the Commission determined it was necessary to examine the kind of role that the advisory board plays in the decision making process for the State agency before an evaluation could be made as to whether a “substantial” conflict of interest arose as a result of the members’ activities. Needless to say, the word “substantial” does not even appear in this rule. Additionally, it is not clear to me how the omission of this word does not have the unintended effect of further restricting the outside activities of non-compensated advisory board members despite the fact this is not harmonious with the legislative intent of Public Officers Law § 74 and the Commission’s own position in AO 98-7, when it applied this law to these individuals due to their indisputable exclusion under the plain language of the statute.

The Proposed Rule under Section 932.9

Section 932.9 of the proposed rule will now be entitled “Codes of Ethics for Uncompensated and Per Diem Directors, Members and Officers.” This new rule states the following:

“The boards or councils whose officers or members are subject to § 73-a of the Public Officers Law and are not subject to § 73 of the law by virtue of their uncompensated or per diem compensation status and the commissions, public authorities, and public benefit corporations whose member or directors are subject to § 73-a of the Public Officers Law and are not subject to § 73 by virtue of their uncompensated or per diem compensation status shall adopt a code of ethical conduct covering conflicts of interest and business and professional activities, including outside activities, of such directors, members, or officers both during and after service with such boards, councils, commissions, public authorities, and public benefit corporations. Such code of ethical conduct shall be filed with the Commission.”

It appears that this proposed rule will require the NYSBA BOC to adopt and file a Code of Ethics to address conflicts of interests concerning their business and professional activities, along with their outside activities. Under the proposed rule of Section 932.5, the NYSBA BOC need not get prior approval before engaging in these outside activities. But, as indicated above, it would seem that the board would now have the additional burden of having to address outside activities that are listed in the proposed section 932.5 in its Code of Ethics.

“Outside Activities” requiring approvals are listed under Section 932.5 as follows:

A job, employment (including public employment), or business venture that generates, or is expected to generate, between \$1,000 and \$5,000 in Compensation annually (approving Authority must approve);

A job, employment (including public employment), or business venture that generates, or is expected to generate, more than \$5,000 in Compensation annually (approving Authority and the Commission must approve);

Holding elected or appointed public office (regardless of Compensation) as an outside activity (approving Authority and the Commission must approve);

Serving as a director or officer of a for-profit entity (regardless of Compensation) (approving Authority and the Commission must approve);

Serving as a director or officer of a not-for-profit entity Compensation is \$0 - \$999 annually (approval not required, but must notify Approving Authority in writing prior to commencing service);

Compensation is between \$1,000 and \$5,000 annually (approving Authority must approve); and

Compensation is more than \$5,000 annually (approving Authority and the Commission must approve);

Once again, in review of this proposed regulation, in requiring members of the NYSBA BOC to adopt a code of ethical conduct covering conflicts of interest as it relates to the above-listed outside activities, no distinction is made for the fact that these outside activities solely relate to “[a] Policy Maker who serves the State on other than a nonpaid or per diem basis.” Hence, the inherent conflicts of interest that clearly exist for compensated policy makers, who engage in the outside activities listed under section 932.5, simply does not exist for nonpaid policy makers, who perform their duties on an advisory board such as the NYSBA BOC.

Additionally, in AO 98-7, the Commission was cautious to note that “[b]ecause of the nature of advisory boards, their members need not suspend outside affiliations that might give rise to appearances of conflicts if held by government decision makers.” See NYS Ethics Commn. AO 98-7. Thus, the Commission previously recognized that where an appearance of a conflict may exist with a paid state employee or officer because of their outside affiliations, advisory board members should not be subjected to the same standards in their endeavors outside of their role on the board. Moreover, the Commission wisely understood that “[...there are too many advisory boards with functions that vary too widely for the Commission to set forth detailed rules that are applicable to all boards in all instances. Each board acts in its own manner in whatever area it has been given authority. The one common thread that can be identified is that each board member must be careful not to act in a manner which results in a personal benefit to his or her

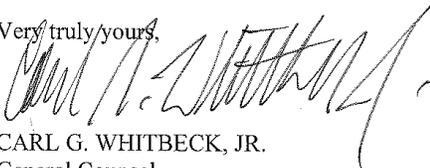
specific employer or organization (as opposed to a general area of interest that the member may represent).” See NYS Ethics Commn. AO 98-7.

It is respectfully submitted that the proposed regulation, as written, now takes an unreasoned “one size fits all” approach to handling apparent conflicts of interest held by both paid and nonpaid policy makers in their outside activities as listed under section 932.5 by requiring advisory boards to adopt rules concerning these matters in their Code of Ethics in compliance with proposed rule 932.9.

As the Commission is well aware, NYSBA BOC members are already rightfully required to comply with the dictates of Public Officers Law § 73-a in making annual financial disclosures. This disclosure statement requires detailed accounting by the BOC concerning their financial affairs and dealings. To subsequently force these members to also enact rules in their Code of Ethics concerning the above proposed list of outside activities, which were clearly drafted to only apply to compensated policy makers, is not only cumulative and cumbersome, but it also disregards the ways in which these members serve and function. Moreover, when the Commission held in AO 98-7, that advisory boards such as NYSBA BOC are further subject to the mandates of Public Officers Law § 74, it was cautious in further holding that “[t]he statute will be applied in a manner that recognizes the special nature of such boards and the responsibilities of their members.” See NYS Ethics Commn. AO 98-7.

In proceeding with the adoption of these proposed regulations, the Commission is now discarding its own binding precedent, as it specifically relates to nonpaid advisory board members with scant reasoning and regard for how these proposed regulations will directly unduly burden those who serve New York in this capacity without compensation. Based on the foregoing, the new proposed regulations should be tailored by the Commission “to give recognition to the special nature of these boards” as it committed to doing in AO 98-7.

Very truly yours,



CARL G. WHITBECK, JR.
General Counsel

cc: Joseph Ruggiero, Executive Director