Novak, Deborah (JCOPE)

From: Marcellus, John (DOCCS)
Sent: Wednesday, July 03, 2013 2:49 PM
To: Joint Commission on Public Ethics (JCOPE)
Subject: Proposed Amended Honoraria Regulations: Department Name Correction

To Whom it May Concern,

The *Proposed Amended Honoraria Regulations* contains inaccurate information in section 930.2(b). The proposal reads, "...,Corrections and Community Services,...". The correct name of this Department is the Department of Corrections and Community Supervision (Corrections Law, Article 1, §2.1).

Sincerely,

John Marcellus

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New York State Office of Children & Family Services

http://ocfs.ny.gov

Andrew M. Cuomo
Governor

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52 Washington Street
Rensselaer, NY
12144-2834

September 20, 2013

Louis Manuta,
Associate Counsel
Joint Commission on Public Ethics
540 Broadway
Albany, N.Y. 12207

Re: JCOPE Regulatory Proposals:
19 NYCRR Parts 930, 931 and 933

Dear Mr. Manuta:

The NYS Office of Children and Family Services has carefully reviewed the Joint Commission on Public Ethics' (JCOPE) regulatory proposals, and offers the following comments (reference is made to the proposed regulatory citations):

Honoraria Regulations (19 NYCRR Part 930):

- 19 NYCRR 930.2(b): We note that OCFS is included in the definition of "Civil Department" and question the need and statutory basis for differentiating between a "Civil Department" from a "State Agency" [19 NYCRR 930.2(i)] throughout the proposals.

- 19 NYCRR 930.2(e) defines honorarium as "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." The deletion of the following language in the existing regulation, "which payment, fee or other compensation is made as a gratuity, or as an award or honor," is problematic. It now appears that any payment made to a state employee for a service performed that is not part of his or her official duties, such as a rent payment to an employee who is a landlord or salary payments to an employee who is engaging in an approved outside activity, can now be considered an honorarium. As this does not appear to be the intent of the regulatory intent, the definition of honorarium should be revised to exclude payments made for purposes unrelated to an honorarium.

An Equal Opportunity Employer

- The deletion of certain of the exceptions to the definition of honorarium currently set forth at 19 NYCRR 930.3 may also create a workload issue for agencies as many more types of activities will need to be reviewed. The proposed elimination of the exception for honoraria received from religious, self-help and civic groups under otherwise acceptable circumstances may require further inquiry into the private activities of State employees.

- 19 NYCRR 930.2(g): Included as part of the definition of "Interested Source" are parties who "negotiate with" a State Agency. Guidance and/or a definition of what constitutes "negotiate with" would be helpful, as the term is vague. The lack of a "de minimus" exemption level in this version of the proposed regulations (a prior version contained a $500 threshold amount for inclusion as an Interested Source) throughout all of the proposals could potentially include routine minor purchases by State agencies, including but not limited to purchase orders and other discretionary expenditures from miscellaneous funds. To the extent many of these purchases are not tracked (even by agencies having tracking systems), an employee has no way of discerning whether an entity may be an Interested Source. This may lead to inadvertent violations of the Public Officers Law (POL) and/or the implementing regulations. It is suggested that the definition be revised accordingly, perhaps excluding routine purchases, or re-inserting a threshold amount.

- 19 NYCRR 930.2(g) also includes as an "Interested Source" "any other State Agency when the Covered Person's agency is to receive the benefits of the contract." This provision would require covered persons and approving authorities to obtain and possess detailed information regarding another individual or entity that is not generally available, known or readily discernible, and thus may lead to inadvertent violations of the POL.

- Including as Interested Sources any individual who "is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, " is especially problematic for an agency such as OCFS, which in 2012 conducted 9,585 administrative reviews of indicated reports of child abuse or maltreatment, as well as 8,277 administrative hearings. Information about the individuals pursuing administrative remedies in child abuse or maltreatment administrative proceedings is confidential pursuant to Social Service Law § 422(4) (A). These matters are not ministerial matters as they require the arbiter to weigh the facts and apply them to the law, and thus require "substantial personal discretion."

- Similarly, whether someone has applied for funds from the agency during the past year is not information that is generally available, known or readily discernible, and thus may lead to inadvertent violations of the POL. OCFS routinely receives applications from individuals for various funds it administers-including but not limited stock loan applications from OCFS' NYS Commission for Blind's Business Enterprise Program, and OCFS' Equipment Loan Fund. The identity of individuals applying for such funds is, in some instances, confidential and not easily discernible. As with other aspects of these regulations, inadvertent violations of the POL may result.

- 19 NYCRR 930.3: Inasmuch as Agency Heads must have requests for honorarium approved by JCOPE [19 NYCRR 930.2(a); 19 NYCRR 930.4(b)], it would be appropriate to specify the time-frames required for submission of such a request to JCOPE.

- 19 NYCRR 930.4(c) (2) currently reads "Identify of the offeror." This appears to be a typographical error. Perhaps this should read "Identify the offeror" or "Identity of the offeror."

- 19 NYCRR 930.4(d) requires the approving authority to retain all Honorarium Approvals for a period of three years. It is unclear whether the agency must also retain documents related to any Honorarium requests which are denied. OCFS assumes that this retention requirement is in lieu of the "Annual Report of Honoraria", currently set forth at 19 NYCRR 930.5(d.)

- 19 NYCRR 930.5(a) (4) describes the criteria the approving authority must apply if the honorarium is offered by an Interested Source. It includes determining that "the honorarium is not, under the circumstances, intended as a reward for any official action on his or her part." It is unlikely that the approving authority would be able to obtain and possess such information, particularly because it could be construed to require knowledge of the mental process of the offeror. This is also true with the requirement in proposed 19 NYCRR 930.5(a) (5), as the appointing authority cannot be expected to know if the honorarium is an otherwise prohibited payment concealed.

- 19 NYCRR 930.7: OCFS supports including both adjunct SUNY/CUNY faculty and state employees in the Research Scientist title series in the exemption from honoraria restrictions. OCFS has a number of employees who have received permission to teach as adjunct faculty members at SUNY/CUNY branches, and recommends that the provision explicitly condition and limit the availability of the exemption upon the employee's service as an adjunct faculty member.

Official Activity Expense/Service Payments: (19 NYCRR Part 931):

- 19 NYCRR 931.2(d): As with the definition of "Interested Source" in proposed 19 NYCRR Part 930, included as part of the definition of "Interested Source" are parties who "negotiate with" a State Agency. Guidance and/or a definition of what constitutes "negotiate with" would be helpful, as the term is vague. The lack of a "de minimus" exemption level in this version of the proposed regulations (a prior version contained a $500 threshold amount for inclusion as an Interested Source) throughout all of the proposals could potentially include routine minor purchases by State agencies, including but not limited to purchase orders and other discretionary expenditures from miscellaneous funds. To the extent many of these purchases are not tracked (even by agencies having tracking systems), an employee has no way of discerning whether an entity may be an Interested Source. This may lead to inadvertent violations of the Public Officers Law (POL) and/or the implementing regulations. It is suggested that the definition be revised accordingly, perhaps excluding routine purchases, or re-inserting a threshold amount.

- 19 NYCRR 931.2(d) also includes as an "Interested Source" "any other State Agency when the Covered Person's agency is to receive the benefits of the contract." This provision would require covered persons and approving authorities to obtain and possess detailed information regarding another individual or entity that is not generally available, known or readily discernible, and thus may lead to inadvertent violations of the POL.

- Including as Interested Sources any individual who "is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, " is especially problematic for an agency such as OCFS, which in 2012 conducted 9,585 administrative reviews of indicated reports of child abuse or maltreatment, as well as 8,277 administrative hearings. Information about the individuals pursuing administrative remedies in child abuse or maltreatment administrative proceedings is confidential pursuant to Social Service Law § 422(4) (A). These matters are not ministerial matters as they require the arbiter to weigh the facts and apply them to the law, and thus require "substantial personal discretion."

- Similarly, whether someone has applied for funds from the agency during the past year is not information that is generally available, known or readily discernible, and thus may lead to inadvertent violations of the POL. OCFS routinely receives applications from individuals for various funds it administers-including but not limited stock loan applications from OCFS' NYS Commission for Blind's Business Enterprise Program, and

OCFS' Equipment Loan Fund. The identity of individuals applying for such funds is, in some instances, confidential and not easily discernible. As with other aspects of these regulations, inadvertent violations of the POL may result.

- 19 NYCRR 931.2(f): The definition of "Official Activity" should be revised to read "...that is part of his or her official duties~~, and benefits the Covered Person's State Agency~~." The last phrase is unnecessary and confusing, particularly because "State Agency" and not "Civil Department" is mentioned.

- 19 NYCRR 931.2(g): The definition of "Official Activity Expense Payment" should be revised to specifically exclude travel reimbursement made in the ordinary course of business, pursuant to NYS Travel policies. As currently drafted, this provision could be interpreted to require JCOPE approval for routine Agency Head travel and reimbursement pursuant to NYS Travel policies.

- 19 NYCRR 931.2(h): Inasmuch as Agency Heads must have requests for travel reimbursement approved by JCOPE [19 NYCRR 931.3(c)], it would be appropriate to specify the time-frames required for submission of such a request to JCOPE.

- 19 NYCRR 931.3(d) requires the approving authority to retain all Official Activity Approvals for a period of three years. It is unclear whether the agency must also retain documents related to any Official Activity requests which are denied. OCFS assumes that this retention requirement is in lieu of the "Annual Report of Honoraria", currently set forth at 19 NYCRR 930.5(d.)

- 19 NYCRR 931.4(b): It appears that the proposed regulations would make mandatory a "Payment in Lieu of Honorarium" for a Service. However, there does not appear to be any comparable provision for payment of Expense Payments. The regulations should be revised to clarify whether this provision also applies to Expense Payments.

- 19 NYCRR 931.4(a) (2) describes the criteria the approving authority must apply if the official activity expense payment or service payment is offered by an Interested Source. It includes determining that the payment "is not, under the circumstances, intended as a reward for any official action on his or her part." It is unlikely that the approving authority would be able to obtain or possess such information, particularly because it could be construed to require knowledge of the mental process of the offeror. This is also true with the requirement in proposed 19 NYCRR 931.4(a)(5), as the appointing authority cannot be expected to know if the activity expense payment is an otherwise

prohibited payment concealed. This could expose the approving authority to unknowingly violating these regulations despite a good faith effort to ascertain this information.

Gift Regulations: (19 NYCRR Part 933): As a general comment, this proposed regulatory part is confusing. Because it is critical that State employees and agencies be advised as to what constitutes a permissible or impermissible gift, it is respectfully suggested that the part be revised so that the definition of "gift" is followed immediately by a listing of all exceptions to that definition, rather than requiring a review of proposed 19 NYCRR 933.2(j), 19 NYCRR 933.2(q), and 19 NYCRR 933.4 to determine the permissibility of a gift.

- 19 NYCRR 933.1(b): The scope of this proposed regulatory part is unclear, especially with respect to the listing prior opinions superseded in whole or in part "...to the extent they are inconsistent with this Part." Proposed Part 933 should be revised to clearly articulate which opinions or portions thereof are superseded.

- 19 NYCRR 933.2(c): The proposed definition of "Charitable Organization" presumes that the person knows or should know whether the entity is registered with the Office of the Attorney General or exempt from such registration. As this information is not gene really or headily available to all persons, inadvertent violations of the POL may result.

- 19 NYCRR 933.2(l): The proposed definition of "Interested Source" would require the recipient/employee to know if the donor contracts with, appears before, negotiates with, is listed as a lobbyist, is involved in any action or proceeding pertaining to the employee's agency, or has received or applied for funds during the prior year. (See OCFS' second comment under "Honoraria.")

  This level of information is not generally possessed by individual State employees. While some of this information can be obtained after exploring agency records, as noted above under OCFS' "Honoraria" comments, inadvertent violations of the POL and/or implementing regulations may result. We suggest that the definitions be revised accordingly.

  As with our comments for the Honoraria and Travel Expense regulations, including as Interested Sources any individual who "is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted" is especially problematic for an agency such as OCFS, which in 2012 conducted 9,585 administrative reviews of indicated reports of child abuse or maltreatment, as well as 8,277 administrative hearings. Information about the individuals pursuing

administrative remedies in child abuse or maltreatment administrative proceedings is confidential pursuant to Social Service Law § 422(4) (A). These matters are not ministerial matters as they require the arbiter to weigh the facts and apply them to the law, and thus require "substantial personal discretion."

- 19 NYCRR 933.3(a) (1)-(3); 19 NYCRR 933.3(b) (1)-(3): These proposed regulatory provisions expand, without guidance, both exceptions to and inclusion within the definition of "gift." Both provisions could be construed to require, at 19 NYCRR 933.3(a) (1) and 933.3(b) (1), respectively, knowledge of the donor's intent and or mental processes at the time of the transaction. While the need for flexibility is understood, the provisions undermine the definitions/exclusions to the gift rules such that both State agencies and State employees will be vulnerable to allegations of impropriety, should facts outside the purview of the State agency or State employee later emerge. If these provisions are to remain, JCOPE should promptly issue guidance upon which both agencies and employees could rely in determining whether a transaction falls within (or outside of) the definition of an impermissible gift.

- 19 NYCRR 933.4(a) (5) specifically excludes from the definition of gifts "food or beverage valued at fifteen dollars or less." The "nominal value" definition set forth at 19 NYCRR 933.2(q) of a fair market value of $10.00 or less for other (non-food/beverage) items could result in confusion and inadvertent violations of the POL. OCFS therefore suggests that a consistent dollar amount apply to both the food/beverage and other items gift exclusions.

- 19 NYCRR 933.4(a): The exclusions from the definition of a gift separately list "Complimentary Attendance (including food and beverage) at a Bona Fide Charitable Event or a Bona Fide Political Event" from "Complimentary Attendance (including food and beverage) offered by the sponsor of a Widely Attended Event," and "meals for participants at a Professional or Educational Program." However, it is unclear whether the Approving Authority must engage in the "Widely Attended Event" analysis for a bona fide charitable or political event, or to allow an employee to participate in a professional or educational program, because only the meal is excluded from the definition of a gift for professional or educational programs [19 NYCRR 933.4(a)(15).]

- 19 NYCRR 933.4(a) (12) notes that a gift is not personal (and therefore not entitled to be excluded from the definition of a gift) if the giftor "seeks to charge or deduct the value of such item as a business expense or seeks reimbursement from a client." This provision would require covered persons and approving

authorities to obtain and possess detailed information regarding another individual or entity that is not generally available, known or readily discernible. If, for instance, a state employee's unemancipated child receives a graduation gift in the form a business check from a family friend who is also a potential Interested Source, the recipient has no reasonable way to determine whether the donor has given similar gifts to other state employees' children, or whether the donor will seek to deduct the value of the gift. This could result in inadvertent violations of the POL and/or these implementing regulations.

- 19 NYCRR 933.4(a) (6), 933.4(a) (7): Many state agencies, including OCFS, routinely contract with numerous registered charitable organizations. To the extent such charities offer complimentary attendance at an event the charitable organization is hosting, it is unclear whether the same would constitute an impermissible gift (i.e., from an Interested Source.) The regulation should be revised to clarify this matter.

- 19 NYCRR 933.4(a)(7)(ii): The requirement that state employees obtain prior approval before attending a Widely Attended Event should be extended to Bona Fide Charitable Events, if they will be attending in their official capacity.

- Finally, the gift regulations do not address the scenario where a state employee is a member of a professional organization that lobbies the employee's state agency and is therefore an Interested Source, such as the New York State Bar Association or the American Psychological Association, and wishes to participate in events that the organization holds only for members. It is suggested that the gift exclusions address this scenario and expressly authorize the same for State employees who may be members of such professional organizations.

Thank you for the opportunity to comment. Should you have any questions, or wish to discuss this matter, please call me at (518) 474-9778.

Very truly yours,
Toni G. Koweek
Toni G. Koweek
Associate Attorney and Agency Ethics Officer

cc: Lee D. Prochera, Esq.
Jara R. Traina, Esq.

Novak, Deborah (JCOPE)

From: DMonica.Marsh@dfs.ny.gov
Sent: Tuesday, September 24, 2013 3:20 PM
To: jcope.sm.jcoperegs
Cc: daniel.alter@dfs.ny.gov; gene.brooks@dfs.ny.gov
Subject: Department of Financial Services Comments on JCOPE's 8/15/2013 Proposed Gifts, Honoraria and Official Activity Expense Payments (Travel) Regulations

The Department of Financial Services (the "DFS") appreciates the opportunity to comment on the proposed Gifts, Honoraria and Official Activity Expense Payments (Travel) regulations that JCOPE circulated for public comments on August 15, 2013. Below are our comments on the following two proposed regulations:

GIFT Regulation - 19 NYCRR Part 933

First, Part 933.2(f) of the gift regulation defines "*complimentary attendance*" to include, among other things, entertainment. However, it also states that complimentary attendance "shall not include registration or admission without charge to an attendee to any entertainment, recreational activity, or reception that is not part of the regular agenda of the event."

Based on the DFS's reading of this definition and exception, it appears permissible for an employee to take part in entertainment, recreational activity, or reception if such activities are part of the *regular* agenda of the event. The DFS often advises its employees not to attend golf outings, museum tours, Broadway shows, etc., even if they are parts of an event's agenda, because we do not find that such entertainment relates to their duties and responsibilities. The current definition/exception in Part 933.2(f), however, appears to permit such activities provided they are part of the regular agenda of the event. We believe that the term "regular" may generate unwanted confusion and suggest either its omission or specific definition.

OFFICIAL ACTIVITY EXPENSE PAYMENTS Regulation - 19 NYCRR Part 931

Second, Part 931.2(f) of the travel regulation defines an *Official Activity* as a "Covered Person's attendance or Service at a meeting, conference, seminar, convention, or professional program that is part of his or her official duties and benefits the Covered Person's State Agency."

Part 931.2(i) defines a *Service* as "any action or service performed by a Covered Person. Such action may include, but is not limited to, delivering a speech, writing, or publishing an article, or making a presentation."

As in the definition for *official activity*, the DFS assumes that any *service* performed under this regulation also must relate to, or be part of, an employee's official duties or benefit the employee's agency. However, the definition in Part 931.2(i) does not contain such language, which leaves it ambiguous and unclear. The DFS suggests that the same clarifying language in Part 931.2(f), i.e., "is part of his or her official duties and benefits the Covered Person's State Agency", be added to the definition for *service*.

Thanks again for the opportunity to comment. We would be happy to answer any questions you may have.

Regards,
D. Monica Marsh
Ethics Officer
(212) 480-5298
dmonica.marsh@dfs.ny.gov

From: "Joint Commission on Public Ethics (JCOPE)" <JCOPE@jcope.ny.gov>
To: "Joint Commission on Public Ethics (JCOPE)" <JCOPE@jcope.ny.gov>

Date: 08/15/2013 02:55 PM
Subject: JCOPE is Accepting Public Comments on proposed regulations for Gifts, Honoraria and Official Activity Expense Payments (Travel)

JCOPE is accepting public comments on proposed regulations for Gifts, Honoraria and Official Activity Expense Payments (Travel).

This eblast serves as a reminder that a Notice of Proposed Rulemaking for Gifts, Honoraria and Official Activity Expense Payments was published in the August 14, 2013 State Register, and public comments on the proposed regulations are being accepted pursuant to the State Administrative Procedure Act.

JCOPE is accepting public comments on these four sets of regulations until September 28, 2013 and comments may be submitted via email to regs@jcope.ny.gov.

Click here for the Notices of Proposed Rulemaking in the State Register.
To view the proposed regulations click here.

Novak, Deborah (JCOPE)

From: Koweek, Toni G (OCFS)
Sent: Wednesday, September 25, 2013 11:47 AM
To: jcope.sm.jcoperegs
Cc: Manuta, Louis (JCOPE); Prochera, Lee (OCFS); Traina, Jara (OCFS)
Subject: JCOPE Regulatory Proposals: 19 NYCRR Part 933

Dear Mr. Manuta:

OCFS hereby submits this comment as an addendum to our comments previously submitted on September 20, 2013. As with those comments, reference is made to the proposed regulatory citations.

19 NYCRR 933.4:

OCFS notes the deletion of the following exclusion from the definition of a "gift", as is currently set forth in Advisory Opinion 08-01, and in JCOPE's Interim Guidance:

> **4)** Other exceptions to the definition of gift, including:
> a) Gifts for customary or special occasions, which are defined as those items that are modest, reasonable, and customary, given on special or unique occasions that occur in the personal life of a State Officer or Employee, such as marriage, illness, retirement or death in a family.

Taken on its own, the deletion could be interpreted as a clear articulation of JCOPE's desire to now include those types of gifts as impermissible. Read in conjunction however, with the introductory language set forth in proposed 19 NYCRR 933.1(b) (" The effect of these regulations is to supersede prior Advisory Opinions issued by predecessor agencies to the Joint Commission on Public Ethics, including Advisory Opinion Nos. 94-16, 96-28, 97-03, and 08-01 to the extent they are inconsistent with this Part.") and that set forth at proposed 19 NYCRR 933.3(a) and (b), which expand, without guidance, both exclusion from and inclusion within the definition of "gift", the impact of the proposed regulatory change is unclear, at best. Is the deletion intended to also exclude gifts of less than nominal value?

As we discussed, JCOPE's intent in deleting the exclusion was to limit these types of permissible gifts to those that also come within proposed 19 NYCRR 933.4(a)(12), "Personal Gifts. However, as defined in the proposed regulations, a "Personal Gift" is very different from the type of gift currently permitted pursuant to Advisory Opinion 08-01. The definition of "Personal Gift" is limited to those gifts given by a family member or a person with a personal relationship with the recipient, and appears to be intended to exempt from JCOPE oversight those gifts having nothing to do with the recipient's status as a State employee. There are multiple instances, however, in which long-standing professional relationships between a State employee and member of the public that do not rise to the level of "Personal Relationship" nonetheless result in an appropriate gift. Where such gifts are appropriate, reasonable and customary, a violation of POL Section 74 is avoided. Requiring State employees/Agency Ethics Officers to first determine the "Personal" extent of a professional relationship before determining whether a gift is permissible is inappropriate, and may lead to inconsistent results. As currently proposed, 19 NYCRR 933.4(a) could be interpreted to preclude a donation to a designated charitable organization from a member of the public for a death in the State employee's family, something we assume was not JCOPE's intent.

Based on the foregoing, OCFS suggest that the exclusion currently set forth in Advisory Opinion 08-01/JCOPE Interim Guidance, be added to the list of exclusions set forth at proposed 19 NYCRR 933.4(a.)

Thank you for the opportunity to comment. If you have any questions or wish discuss, please call me.

Toni G. Koweek
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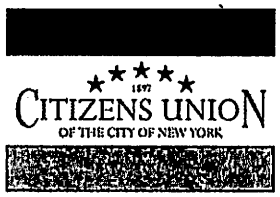

September 27, 2013

Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207
Email: regs@jcope.ny.gov

VIA EMAIL

Dear Commissioners,

We write in response to the invitation for public comment by the Joint Commission on Public Ethics (JCOPE) regarding guidance on gifts for government employees (Parts 933) and lobbyists (Part 934); expense reimbursement for state employees (Part 931); and honoraria (part 930) pursuant to the Public Integrity Reform Act (PIRA) of 2011. Citizens Union provided comments on preliminary drafts of these regulations on March 8, 2013, and is now providing our final comments and recommendations, as these regulations were formally posted in the New York State Register for comment prior to official adoption.

Citizens Union is a nonpartisan good government group dedicated to making democracy work for all New Yorkers. Citizens Union serves as a civic watchdog, combating corruption and fighting for political reform. We work to ensure fair and open elections, honest and efficient government, and a civically-engaged public.

Regarding Parts 930, 931 and 933, Citizens Union continues to be concerned that the certain provisions of the preliminary regulations do not apply to members of the legislature and legislative employees. PIRA specifies that JCOPE, in conjunction with the Legislative Ethics Commission, conduct a review of all advisory opinions, regulations and the law under their jurisdiction[1] by February 1, 2015, yet also continues to provide that JCOPE issue its own regulations regarding receipt of gifts and honoraria[2] for those under its jurisdiction, which includes legislators and legislative employees.[3] Additionally, JCOPE is authorized to investigate possible violations of §73 and §74 of the Public Officers Law for all persons under its jurisdiction.

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[1] Executive Law §94(1)
[2] Executive Law §94(17)(a)
[3] Executive Law §94(1) specifies that legislators and legislative employees are under its jurisdiction: "There is established within the department of state a joint commission on public ethics which shall consist of fourteen members and shall have and exercise the powers and duties set forth in this section with respect to statewide elected officials, members of the legislature and employees of the legislature..." Indeed, the appointment of Commissioners of JCOPE by the legislature and the governor provides that the commission jointly oversees both branches.

Citizens Union of the City of New York
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Peter J.W. Sherwin, Chair • Robert Abrams, CUF President • Dick Dadey, Executive Director

Citizens Union recognizes that the Legislative Ethics Commission (LEC) is authorized to provide advisory opinions to individuals pursuant to §80(7)(l) of the Legislative Law, as well as provide for generic advisory opinions; however, only in the circumstance of an individual advisory opinion being rendered by the LEC is JCOPE prohibited from investigating the individual for actions which have been approved under the opinion. Actions which are not approved by the LEC's opinion for an individual which may be in violation of the Public Officers Law are under JCOPE's jurisdiction, however.

We continue to believe strongly that it is important that JCOPE affirm its jurisdiction over the legislature by specifically providing that Parts 930, 931 and 933 and any related approval processes apply to legislators and legislative employees. The Public Integrity Reform Act provides for unified oversight rather than the previous bifurcated approach, and we believe the regulations as currently drafted are flawed and run counter to the important goal of the reforms.

We are also concerned that these regulations would not take effect prospectively, as drafted in the preliminary recommendation, but rather would appear to be applicable to past conduct. Given that this is a second draft of the regulations, we were surprised to see them change in this regard. While we recognize that PIRA made certain changes with regard to the acceptance and definition of gifts which have already taken effect, JCOPE's regulations are the guidance that is looked to by the regulated community in complying with the law. We urge these regulations be amended to be prospective to ensure that the regulated community knows the rules of the road going forward, as we recommended for JCOPE's regulations on sources of income and reportable business relationships.

Regarding global comments that span parts 930, 931 and 933, we largely support the changes to the definitions. Specifically, we support the following:

- the addition to the definition of "state officers and employees" the employees of public authorities, public benefit corporations and commissions which have at least one member appointed by the governor; and
- the elimination of the $500 threshold for seeking or holding a state contract before being determined as an interested source.

Our comments and recommendations for each of the regulations are presented below regarding issues beyond the jurisdiction of JCOPE and the LEC. Our comments acknowledge the changes made between the preliminary regulations and those draft regulations currently under public review pursuant to the State Administrative Procedure Act.

<u>Part 930 – Draft Regulations on "Honoraria: Limitation and Approval"</u>

Citizens Union supports the changes made to the draft regulation to clarify the approval process for acceptance of honorarium. Specifically, by requiring all three criteria to be met in order for an honorarium to be acceptable under Part 930.5, rather than simply one, the regulation will be appropriately more strict to ensure that honorarium from interested sources do not intend to influence, be expected to influence, or are intended as a reward for any covered individuals.

Part 931 – Draft Regulations on "Official Activity Expense Payments and Service Payments to the State: Limitation and Approval"

Similar to Part 930, Citizens Union supports the changes made with regard to the approval process for official expense and service payments to clarify that all criteria must be met under part 931.4.

Part 933 – Draft Gift Regulations: Public Officers Law

Similar to Parts 930 and 931, Citizens Union supports the changes made with regard to the approval process for official expense and service payments to clarify that all criteria must be met under 933.3.

While we support the clarification of the definition of interested source to include spouses and emancipated children, as has been included in the definition in parts 930 and 931, the definition appears differently in 933 versus 930 and 931 (which are the same). The definition should be presented consistently to prevent confusion.

With regard to the definition of "nominal value" under 933.2(q) and the acceptance of food and beverages under 933.4(a)(5), we question why items of nominal value of $10 or less are allowed in certain circumstances, while food and beverages valued at $15 or less are allowed in certain circumstances. Uniformity in this value would perhaps be more logical and likely to be complied with consistently.

Further, regarding the value of food and beverages valued at $15 or less, the regulation states that the following is not a gift: "Food and beverage valued at fifteen dollars or less ***per occasion,***" (emphasis added). In 933.3(c), however, while one gift may be allowable, multiple gifts may not be if it would create a "reasonable basis for an inference" that it was intended to influence the official. It is therefore unclear how food and beverages are to be treated. We therefore recommend that the regulations consider whether multiple gifts of food and beverages reflect a pattern that is no longer occasional, but rather a regular – and potentially problematic – occurrence.

Regarding Widely Attended Events, Citizens Union encourages JCOPE to continue to examine whether it may be advisable to set a cost threshold for approval.

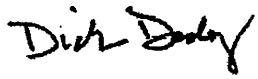
Part 934 – Draft Gift Regulations: Legislative Law (Lobbyists and Clients)

Citizens Union is pleased to see that the regulations were amended to address technical issues we noted in our March 8th commentary, particularly that references to *excluded* gifts are made clear throughout when speaking to *permissible* gifts. We continue to recommend, however, that JCOPE examine whether it is advisable to use additional language similar to that it adopted to determine whether sources of income to lobbyists are a single source in determining whether gifts are from a single source.

Similar to changes made in 930, 931 and 933, we support the changes made with regard to determining allowable gifts under 934.3 to clarify that all criteria must be met. We also support the changes to 934.3(d) which clarify that gifts may also not be made on behalf of the spouse or unemancipated child of a public official to a third party.
Similar to Part 933, we urge the commission to provide uniformity in Part 934 regarding items of nominal value and food and beverages so that the monetary value is the same, rather than $10 and $15, respectively.

Citizens Union thanks JCOPE for the opportunity to submit our comments, and is available to discuss our recommendations in greater detail. Should you have any questions or comments, do not hesitate to contact us at 212-227-0342.

Sincerely,



Dick Dadey
Executive Director

Novak, Deborah (JCOPE)

From: BarbaraSmith@osc.state.ny.us
Sent: Monday, September 30, 2013 3:38 PM
To: jcope.sm.jcoperegs
Subject: Comments on Proposed Regulations
Attachments: Part 933 Gifts OSC Comment 9-30-13.docx; Part 933 Gifts Regs, OSC Mark Up 9-30-13.docx; Part 931 Off Activ Reimb Mark-up 9-30-13.docx; Part 930 Honoraria Mark-up 9-30-13.docx; Part 930 Honoraria OSC Cover 9-30-13.docx; Part 931 Off Activ Reimb OSC Cover 9-30-13.docx

On behalf of the Office of the State Comptroller, here are comments on JCOPE proposed regulations Parts 930, 931 and 933. I would be pleased to discuss these further, should you wish.
I will also forward a hard copy for your files.

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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

September 30, 2013

To: Joint Commission on Public Ethics

From: Barbara F. Smith, Special Counsel for Ethics

Subject: Comments on Proposed JCOPE Regulations
Part 933: Gifts

On behalf of the Office of the State Comptroller, I offer these comments on the Gifts Regulations published by the Joint Commission on Public Ethics (JCOPE) pursuant to power granted in Executive Law§94(17)(a).

1) Comments Addressing the Fundamental Changes from Current Advisory Opinion Advice

Regulation of conduct in the ethics arena is never a simple matter, and the value of establishing "bright lines" for those who are affected by the law, rules, and opinions is paramount. Certainly, this Office and Comptroller DiNapoli are on record as supporting transparency and accountability for those serving in State government. However, these proposed regulations as currently crafted appear likely to result in a more varied, subjective application of a difficult standard regarding which gifts are permissible.

Reviewing the related history, in Advisory Opinion No. 94-16, the State Ethics Commission sought to make sensible Public Officers Law §73(5), which then barred State officers and employees from receiving gifts valued at $75 or more "under circumstances in which it could be reasonably inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part." Following precedents set by the U.S. Office of Government Ethics, the Commission adopted the "disqualified source" category, which described people and entities with more than ministerial relationships with State agencies, State officers and employees, and it concluded that gifts from those sources were "*per se*" intended to influence or reward official action. This standard has the value of clarity, and it overcame the statutory scheme that one court determined to be void for vagueness.[1]

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[1] In People v. Moore, 85 Misc 2d 4 (1975), the Court held unconstitutional as violative of the due process and equal protection clauses (of the NYS and US Constitutions) the language of General Municipal Law §805-a(1)(a), which prohibited municipal employees from accepting gifts valued at $75 or more "*under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him,*" having determined

When Public Officers Law §73(5) was amended by the Public Employee Ethics Reform Act of 2007 (PEERA) to bar the solicitation or receipt of a gift having more than *nominal value* (down from $75), the Commission on Public Integrity, in its Advisory Opinion No. 08-01, updated Advisory Opinion No. 94-16 and modified it to reflect other related changes brought by PEERA. Opinion analysis emphasized the implications of the change to "nominal" value for permissible gifts.

The current proposed regulations issued by JCOPE interpret, in part, the reforms enacted under the Public Integrity Reform Act of 2011 (PIRA), which included an amendment to the Legislative Law §1-c to exclude from the definition of a gift (given by lobbyists and clients) food and beverage valued at $15 or less.

These proposed Gift Regulations, while maintaining the concept of "disqualified sources" substitute a new name – "Interested Source" – and then eliminate the *per se* bar against accepting gifts from such sources, as the predecessor Commissions concluded in Advisory Opinions Nos. 94-16 and 08-01, noted above. Instead, the solicitation, receipt or acceptance of a gift from an Interested Source – while deemed to be "presumptively impermissible" would nevertheless be allowed – if "*it is not reasonable to infer that the Gift was intended to influence the Covered Person, and it could not reasonably be expected to influence the Covered Person in the performance of his or her official duties; and it is not reasonable to infer that the Gift was intended as a reward for any official action on the Covered Person's part.*" [Part 933.3(a)].

Reverting to this subjective analysis is likely to create uncertainty among Covered Persons as to what is permissible, and the change will likely be perceived by the public as a weakening of the standards to which State officers and employees are to be held. The regulations do not specify who makes that determination of "reasonable inference," and no role is required for State agency designees to weigh in with analysis of the circumstances and to provide advice to the potential recipient.[2] Instead, it appears that gift recipients are able to make that determination regarding the donor's intent to influence or reward official action, absent a bright line standard. As a result, widely varying interpretations are likely.

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such language to be unconstitutionally vague and without any standards or guidelines whatsoever. (Subsequently, appellate courts have sustained the imposition of both civil and criminal sanctions against State employees for violations of Public Officers Law §73(5), but the courts did not again specifically consider the constitutionality of the statute [See, People v. Zambuto, 73 AD 2d 828 (4th Dept, 1979), and Rubenfeld v. NYS Ethics Commission, 43 AD3d 1195 (3rd Dept., 2007)]. In the latter case, the court noted that upholding the violation was consistent with the Commission's "long-standing interpretation of Public Officers Law §73(5) as forbidding the acceptance of gifts by State employees from an entity that has or seeks contracts with the state agency where the employee works." These proposed regulations appear to undo that long-standing interpretation and revert to the subjective analysis regarding the donor's intent to influence or reward official action.

[2] However, Agency Approving Authorities do have a role in reviewing the permissibility of accepting complimentary attendance to a Widely Attended Event. [933.4(7)]

Furthermore, it appears that the value of the distinction between "Interested Sources" and sources which are not-"Interested" is diminished, since the same analysis is to be applied for donations from either category. Part 933.3(b) essentially applies the same subjective test to gifts offered by not-Interested Sources, as is applied for Interested Sources, albeit the inference is that gifts from an Interested Source is presumptively impermissible, while a gift from a non-Interested Source is presumptively permissible. A plain reading of the proposed text would result in State employees analyzing circumstances to determine whether "it could reasonably be inferred" that the gift was intended to influence him or reward him, in the performance of official duties, no matter who the donor was.[3] It should also be noted that the switch of negative and positive inference as between the regulatory text relating to Interested and non-Interested sources makes interpretation even more difficult – and Covered Persons will find it difficult to obey a regulation that they do not understand.

Additionally, the concept of Multiple Gifts [Part 933.3(c)] – while focusing on any given twelve-month period – does not distinguish permissibility based on the source of the gift (multiple permissible gifts from not-Interested sources may also be improper), nor is there a link between the value of what is received and the determination regarding when the next Gift in a series of Multiple Gifts becomes prohibited. Such lack of clarity leaves Covered Persons vulnerable to subsequent administrative proceedings.

Finally, these final regulations require a Covered Person to secure written pre-approval to attend a Widely Attended Event, but it is unclear what the consequences are for failure to do so. However, considering that the specific enforcement provisions of Part 933.6 enable the Commission to investigate possible violations of Public Officers Law §§73 and 74 *and their corresponding regulations* and to "take appropriate action as authorized in these statutes," the consequences for such failure to obtain prior written approval to attend Widely Attended Events are potentially severe. (Executive Law §94(17)(a), authorizing the adoption of gifts regulations by JCOPE provides "a violation of such rules in and of itself shall not be punishable pursuant to subdivision fourteen of this section unless the conduct constituting the violation would otherwise constitute a violation of this section.") However, knowing and intentional violation of Public Officers Law §73(5) subjects the violator to a penalty in the amount not to exceed $40,000 and the value of any gift received in connection with such violation. Knowing and intentional violations of Public Officers Law §74 may result in fines, suspension or removal from office, with potential monetary penalties up to $10,000 and the value of the benefit received. At a minimum, the consequence for failure to obtain prior approval should be narrowed to include only Public Officers Law §74 penalties.

2) *Suggestions for Your Further Consideration.*

- Clarify what consequences there are for donors of impermissible gifts.

Public Officers Law §73(5)(a) states in part:

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[3] Albeit, all three prongs must be met for a gift from an Interested Source to be permissible, and only one prong need be present for a gift from a non-Interested source to be impermissible.

> "... No person shall, directly or indirectly, offer to make any such gift to a statewide elected official, or any state officer or employee, member of the legislature or legislative employee under such circumstances."

Nothing in the proposed regulations addresses what action the Commission may take against those donors who offer or make impermissible gifts, and the regulations would provide an opportunity to indicate JCOPE's intent.

3) The attached marked-up copy of the regulations shows additional, specific comments.

Attachment

PROPOSED GIFT REGULATIONS – PART 933

Title 19 NYCRR PART 933 is added to read as follows:

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 19. DEPARTMENT OF STATE

CHAPTER XX. JOINT COMMISSION ON PUBLIC ETHICS

TITLE 19 NYCRR PART 933: GIFTS (Pursuant to Public Officers Law)

933.1 Purpose and Effect of Regulation.

(a) The purpose of these regulations is to effectuate the statutory provisions of Public Officers Law §73(5), which incorporates 1-c(j) of article 1-A of the Legislative Law.

Comment [b1]: Suggest substituting "by incorporating the standards of..."

(b) The effect of these regulations is to supercede prior Advisory Opinions issued by predecessor agencies to the Joint Commission on Public Ethics, including Advisory Opinion Nos. 94-16, 96-28, 97-03, and 08-01 to the extent they are inconsistent with this Part.

933.2 Definitions.

(a) *Bona Fide Charitable Event* shall mean a function the primary purpose of which is to provide financial support to a Charitable Organization.

(b) *Bona Fide Political Event* shall mean a function the primary purpose of which is to support a Political Organization or Political Candidate.

(c) *Charitable Organization(s)* shall mean:

(1) an entity as defined in Executive Law §171-a(1) that is registered with the Office of the Attorney General, as required by Executive Law §172, unless otherwise exempted from filing pursuant to Executive Law §172-a; or

(2) or an entity organized and operated exclusively for charitable purposes and qualified as an exempt organization by the United States Department of Treasury under section 501(c)(3) of the Internal Revenue Code; or

(3) a person who requests contributions for the relief of any individual, specified by name at the time of the solicitation, if all of the contributions collected, without any deductions whatsoever, are paid to or for the benefit of the named beneficiary, provided the individual has submitted a form entitled "Charitable

Solicitation for the Relief of an Individual" with the Charities Bureau of the Office of Attorney General prior to the event.

(d) *Client* shall mean every person or organization as defined in §1-c(b) of article 1-A of the Legislative Law.

(e) *Commission* shall mean the New York State Joint Commission on Public Ethics.

(f) *Complimentary Attendance* shall mean the waiver of all or part of a registration or admission fee, or waiver of all or part of a fee or charge for the provision of food, refreshments, entertainment, instruction, or materials. "Complimentary Attendance" shall include the awarding of continuing education credits or certification for attendance at a program provided such credits or certification are offered to all attendees. "Complimentary Attendance" shall not include registration or admission without charge to an attendee to any entertainment, recreational activity or reception that is not part of the regular agenda of the event. "Complimentary Attendance" also shall not include travel, lodging, or items of more than Nominal Value.

Comment [b2]: Does the highlighted phrase refer only to a "reception" or to entertainment and recreational activities as well? Would the clarification fit better into the definition of a Widely Attended Event?

Comment [b3]: Question: If a reception is on the agenda, but held off-site, may a Covered Person accept sponsored shuttle service to attend the reception?

Comment [b4]: Question: If the conference sponsors provide a "goodie bag," to all those who attend, may a Covered Person accept it?

(g) *Covered Person(s)* shall mean:

(1) State Officer(s) or Employee(s) as defined in subdivision (v) of this section;

(2) Legislative Employee as defined in subdivision (m) of this section; or

(3) Legislative Member as defined in subdivision (n) of this section.

(h) *Educational Program* shall mean formal instruction provided to attendees. Factors to be considered in assessing whether a program is educational include, but are not limited to: the curriculum, whether the entity providing the program, or the instructors, are accredited, certified or otherwise qualified to provide the program; who the program is presented to, and where and how the program is presented.

(i) *Family Member* of any *Covered Person* shall have the same meaning as the term *Relative* set forth in Public Officers Law §73(1)(m).

(j) *Gift* shall mean anything of more than Nominal Value in any form including, but not limited to: money, service, loan, travel, lodging, meals, refreshments, entertainment, discount, forbearance of an obligation or a promise that has a monetary value. Notwithstanding the preceding sentence, the exclusions contained in section 933.4 are not Gifts and do not need to be analyzed under section 933.3.

(k) *Informational Event* shall mean an event or meeting the primary purpose of which is to provide information about a subject or subjects related to a Covered Person's official responsibilities.

(l) *Interested Source* shall mean any person or entity who on his or her own behalf, or on behalf of an entity, satisfies any one of the following:

(1) is regulated by, negotiates with, appears before in other than a Ministerial Matter, seeks to contract with or has contracts with, or does other business with:
(i) the Legislative Member, the Legislative Employee, or the State Officer or Employee, in his or her official capacity; or
(ii) the State Agency with which the State Officer or Employee is employed or affiliated; or
(iii) any other State Agency when the State Officer or Employee's agency is to receive the benefits of the contract; or

(2) with respect to a Legislative ~~employee~~ Member or a Legislative ~~Member~~ employee, is required to be listed on a statement of registration pursuant to §1-e(a)(1) of article 1-A of the Legislative Law, or is the spouse or unemancipated child of any person required to be listed on a statement of registration pursuant to §1-e(a)(1) of article 1-A of the Legislative Law; or

Comment [b5]: Parallel structure to (1) above

(3) with respect to State Officers and Employees, is required to be listed on a statement of registration pursuant to §1-e(a)(1) of article 1-A of the Legislative Law and lobbies or attempts to influence actions, decisions, or policies of the State Agency with which the State Officer is employed or affiliated; or

(4) with respect to State Officers and Employees, is the spouse or unemancipated child of any individual satisfying the requirements of section 933.2(l)(3); or

(5) is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either:

(i) the State Officer or Employee in his or her official capacity; or

(ii) the State Agency with which the State Officer or Employee is employed or affiliated; or

(6) has received or applied for funds at any time during the previous twelve months up to and including the date of the proposed or actual receipt of the item or service from either:

(i) the Covered Person in his or her official capacity; or
(ii) the State Agency with which the State Officer or Employee is employed or affiliated.

(m) *Legislative Employee* shall mean any officer or employee of the New York State Legislature but it shall not include members of the Legislature.

(n) *Legislative Member* shall mean any duly elected member of the New York State Legislature.

(o) *Lobbyist* shall mean every person or organization as defined in §1-c(a) of article 1-A of the Legislative Law.

(p) *Ministerial Matter* shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion.

(q) *Nominal Value* shall mean an item or service with a fair market value of ten dollars or less.

(r) *Political Candidate* shall mean any individual meeting any of the requirements in Public Officers Law §§73-a(2)(a)(iii)-(viii), including the current office holder.

(s) *Political Organization* shall mean any entity that is affiliated with or a subsidiary of a political party including, without limitation, a partisan political club or committee, or a campaign or fund-raising committee for a political party or Political Candidate.

(t) *Professional Program* shall mean a program that provides information, such as trends in an industry or discipline, which would benefit the administration or operation of the State and would enable a Covered Person to perform his or her duties more effectively. It shall not include a program, the primary purpose of which is the promotion or marketing of products or services for purchase or lease by the State.

(u) *State Agency* shall mean any civil department; State department, or division, board, commission, or bureau of any State department or civil department; any public benefit corporation, public authority, or commission at least one of whose members is appointed by the Governor. State agency shall also include the State University of New York or the City University of New York, including all their constituent units except (1) community colleges of the State University of New York and (2) the independent institutions operating statutory or contract colleges on behalf of the State.

(v) *State Officer(s) or Employee(s)* shall mean:

(1) Statewide elected officials (Governor, Lieutenant Governor, Comptroller, and Attorney General of the State of New York);

(2) Heads of civil departments and State departments and their respective deputies and assistants other than members of the Board of Regents of the University of the State of New York who receive no compensation or are compensated on a per diem basis;

(3) Officers and employees of statewide elected officials;

(4) Officers and employees of state departments, boards, bureaus, divisions, commissions, councils, or other State Agencies other than officers of such boards, commissions or councils who receive no compensation or are compensated on a per diem basis;

(5) Employees of public authorities (other than multi-state authorities), public benefit corporations, and commissions at least one of whose members of such public authorities, public benefit corporations, and commissions is appointed by the Governor; and

(5) Members or directors of public authorities, (other than multi-state authorities), public benefit corporations, and commissions identified in section 933.2(v)(5) who receive compensation other than on a per diem basis.

(x) *Widely Attended Event* shall mean an event as defined in Section 933.4(a)(7)(i).

933.3 Gifts.

(a) If the item or service solicited, received, or accepted by a Covered Person meets the definition of Gift and is from an Interested Source, it is presumptively impermissible. Such a Gift is only permissible if, under the circumstances, all of the following criteria are met:

(1) it is not reasonable to infer that the Gift was intended to influence the Covered Person; and
(2) it could not reasonably be expected to influence the Covered Person in the performance of his or her official duties; and
(3) it is not reasonable to infer that the Gift was intended as a reward for any official action on the Covered Person's part.

Comment [b6]: It may be useful to add a provision noting that the Covered Person may seek advice/assistance from an agency ethics official or specific agency designee. If the Covered Person or the agency designee decides that the Covered Person's impartiality would be questioned, then the Covered Person may not accept the gift, unless the agency designee, considering all the circumstances, determines that the interest of the Government in the Covered Person's participation outweighs the concern that a reasonable person may question the integrity of the Covered Person and/or the agency's programs and operations. [Adapted from the US Department of Justice bulletin "Do It Right", provisions on resolving appearance concerns.]

(b) If the item or service solicited, received, or accepted by a Covered Person meets the definition of Gift and is not from an Interested Source, then the Gift is presumptively permissible. Such Gift is not permissible if, under the circumstances any one of the following criteria is met: (1) it could reasonably be inferred that the Gift was offered or given with the intent to influence the Covered Person, or (2) it could reasonably be expected to influence the Covered Person in the performance of his or her official duties, or (3) it could reasonably be inferred that the Gift was offered or given with the intent to reward for any official action on his or her part.

(c) Multiple Gifts. A Gift that is otherwise permissible under sections 933.3(a) or (b) may be prohibited if it is one of multiple Gifts from the same person or entity offered within any 12-month period. Such Gifts could create reasonable basis for the inference that the Gift was intended to influence or reward the Covered Person in connection with the performance of his or her official duties.

(d) Directing Impermissible Gifts to Third Parties Prohibited. A Covered Person may not direct a Gift that is impermissible under sections 933.3(a), (b), or(c) to any third party, including a Charitable Organization.

(e) A Gift that is permissible under sections 933.3(a), (b), or (c) satisfies the Covered Person's obligations under Public Officers Law §§73 and 74 with respect to such Gift.

933.4 Exclusions.

(a)The following are not Gifts:

(1) Anything for which a Covered Person has paid fair market value.

Comment [b7]: Would payment after receipt make the gift permissible? The federal government has such a provision: if a federal employee has received a gift that cannot be accepted, the employee may:
- the employee may return the gift
- the employee may pay its market value
- if the gift is perishable (e.g. a fruit basket or flowers) and it is not practical to return it, the gift may, with approval, be given to charity, shared with the office, or destroyed

(2) Anything for which the State has paid or secured by State contract.

(3) Rewards or prizes given to competitors in contests or events (including random drawings) offered to the general public or a segment of the general public defined on a basis other than status as a Covered Person.

(4) Contributions reportable under article fourteen of the Election Law, including contributions made in violation of that article of the Election Law.

(5) Food or beverage valued at fifteen dollars or less per occasion.

(6) Complimentary Attendance (including food and beverage) offered at a Bona Fide Charitable Event or a Bona Fide Political Event.

(7) Complimentary Attendance (including food and beverage) offered by the sponsor of a Widely Attended Event.

(i)Widely Attended Event shall mean an event:

(A) which at least twenty-five individuals other than members, officers or employees from the governmental entity in which the Covered Person serves attend or were, in good faith, invited to attend in person; and

(B) which is related to the attendee's duties or responsibilities or allows the Covered Person to perform a ceremonial function appropriate to his or her position. For the purposes of this exclusion, a Covered Person's duties or responsibilities shall include but not be limited to either:

(1) Attending an event or a meeting at which a speaker or attendee addresses an issue of public interest or concern as a significant activity at such event or meeting; or
(2) For elected Covered Persons, or their staff attending with or on behalf of such elected officials, attending an event or a meeting at which more than one-half of the attendees, or persons invited in good faith to attend in person, are residents of the county,

district, or jurisdiction from which the elected Covered Person was elected.

(ii) Prior Written Approval Required for State Officers or Employees.

(A) A State Officer or Employee must seek prior written approval from his or her State Agency (or such person's appropriate designee for the State Officer or Employee involved) before accepting Complimentary Attendance at a Widely Attended Event. Approval shall be based on an analysis of whether the event satisfies the requirements of a Widely Attended Event as set forth in Section 933.4(a)(7)(i).

(B) Approval of a State Officer or Employee's request for Complimentary Attendance at a Widely Attended Event does not extend to any other individual.

(8) Awards, Plaques, and Other Ceremonial Items.

Awards, plaques, and other ceremonial items must be publicly presented, or intended to be publicly presented, and in recognition of service related to a Covered Person's official duties and responsibilities. Additionally, such awards, plaques, and other ceremonial items must be of the type customarily bestowed at similar ceremonies and be otherwise reasonable under the circumstances.

(9) Honorary degrees bestowed upon a Covered Person by a public or private college or university.

(10) Promotional Items.

Items having no substantial resale value such as pens, mugs, calendars, hats, and t-shirts which bear an entity's name, logo, or message in a manner which promotes the entity's cause.

(11) Goods and Services and Discounts for Goods and Services

(i) Goods and services, or discounts for goods and services, must be offered to the general public or a segment of the general public defined on a basis other than status as a Covered Person and offered on the same terms and conditions as the goods and services are offered to the general public or segment thereof.

(ii) Notwithstanding section 933.4(a)(11)(i), discounts made available to all Covered Persons are covered by this exclusion.

(iii) Notwithstanding section 933.4(a)(11)(i), discounts made to a select group of Covered Persons may fall within this exclusion. The following non-exhaustive list of factors shall be considered when any discount is

made available to a select group of Covered Persons to determine whether the discount would fall within this exclusion:

(A) the scope of the class of Covered Persons who are offered the discount;

(B) the amount and duration of the discount;

(C) whether the criterion for the offer is based on factors other than the Covered Person's official duties and responsibilities; or

(D) For State Officers and Employees, whether the offeror is an Interested Source.

(12) Personal Gifts.

(i) Gifts from a Family Member or person with a personal relationship with a Covered Person when it is reasonable to infer that the Gift was primarily motivated by the family or personal relationship. Personal Gifts may include an invitation to attend a personal or family social event.

(ii) In determining whether the Gift was primarily motivated by a family or personal relationship, the factors to be considered include but are not limited to:

(A) the history and nature of the relationship between the individual offering the Gift and the recipient, including whether items have previously been exchanged;

(B) whether the item was purchased by the individual offering the Gift; and

(C) whether the individual offering the Gift at the same time gave similar items to other Covered Persons.

(iii) The Gift shall not be considered to be motivated by a family, household, or personal relationship if the individual or entity seeks to charge or deduct the value of such item as a business expense or seeks reimbursement from a client or Client.

(13) Reimbursement of Expenses for Speakers at Informational Events

Travel reimbursement or payment for transportation, meals, and accommodations for an attendee, panelist, or speaker at an Informational Event when such reimbursement or payment is made by a governmental entity or by an in-state accredited public or private institution of higher

education that hosts the event on its campus, provided, however, that the Covered Person may only accept lodging from an institution of higher education:

(a) at a location on or within close proximity to the host campus; and

(b) for the night preceding and the nights of the days on which the attendee, panelist, or speaker actually attends the Informational Event.

(14) Provision of Local Transportation to Inspect Facilities

(i) Provision of local transportation to inspect or tour facilities, operations, or property located in New York State, when such inspection or tour is related to the Covered Person's official duties or responsibilities is covered by this exclusion; and

(ii) The payment or reimbursement for expenses for lodging or travel expenses to and from the locality where such facilities, operations, or property are located are not covered by this exclusion. The acceptance of such payment or reimbursement is governed by Part 931.

(15) Meals for Participants at a Professional or Educational Program

(i) Receipt of food and beverages when participating in a Professional Program or Educational Program as a part of a Covered Person's official duties, provided the food or beverages are available to all participants.

(b) With respect to the solicitation, acceptance, or receipt of items and services identified in sections 933.4(a)(5)-(15), nothing in this Part shall be construed as relieving a Covered Person's obligations under Public Officers Law §74 with respect to such items or services.

933.5 Multiple Non-Gifts.
Nothing in this Part shall be construed as relieving a Covered Person's obligations under Public Officers Law §74 with respect to the solicitation, receipt, or acceptance of multiple items, services, or any other things of value that, individually, are not Gifts solely because each has less than Nominal Value.

933.6 Enforcement.

The Commission is authorized pursuant to Executive Law §94 to investigate possible violations of Public Officers Law §73 and §74 and their corresponding regulations and take appropriate action as authorized in these statutes.

933.7 Minimum Requirements.

Nothing contained in this Part shall prohibit any State Agency from adopting or implementing its own rules, regulations, or procedures that are more restrictive than the requirements of this Part.

PROPOSED RULE - PART 931

Title 19 NYCRR Part 931 is amended to read as follows:

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 19. DEPARTMENT OF STATE

CHAPTER XX. JOINT COMMISSION ON PUBLIC ETHICS

PART 931: OFFICIAL ACTIVITY EXPENSE PAYMENTS AND SERVICE PAYMENTS TO THE STATE: LIMITATIONS AND APPROVAL

931.1 Purpose and Effect of Regulations.

(a) The purpose of these regulations is to establish the procedures and conditions for approval and acceptance of payments related to the attendance, registration, travel, lodging, and food for specified New York State officials and employees when such persons are engaged in activities, or are providing services, that are part of their official duties.

(b) The effect of these regulations is to supersede prior regulations and any Advisory Opinions or other guidance issued by predecessor agencies to the Joint Commission on Public Ethics to the extent such Advisory Opinions and guidance are inconsistent with this Part.

931.2 Definitions.

(a) *Approving Authority* for a State Officer or Employee shall mean the head of a State Agency or appointing authority, as appropriate, or his or her designee. In the case of a Statewide Elected Official and the head of a State Agency, it shall mean the New York State Joint Commission on Public Ethics.

Comment [b1]: May wish to include: "which may delegate the approving authority to its Executive Director."

(b) *Commission* shall mean the New York State Joint Commission on Public Ethics.

(c) *Covered Person(s)* shall mean:

(1) State Officers or Employees as defined in subdivision (l) of this section;

(2) Statewide Elected Officials as defined in subdivision (m) of this section;

(d) *Interested Source*. The term Interested Source shall mean any person or entity, on his or her own behalf or on behalf of anentity, that:

(1) is regulated by, or negotiates with, appears before in other than a Ministerial Matter, seeks to contract with or has contracts, or does other business with: (i) the Covered Person in his or her official capacity; or (ii) the State Agency with which a Covered Person is employed or affiliated; or, (iii) any other State Agency when the Covered Person's agency is to receive the benefits of the contract; or

(2) is required to be listed on a statement of registration pursuant to §1-e(a)(1) of article 1-A of the Legislative Law and lobbies or attempts to influence actions, decisions, or policies of the State agency with which the covered Person is employed or affiliated; or

(3) or is the spouse or unemancipated child of any individual satisfying the requirements of section 931.2(d)(2); or

(4) is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either: (i) the Covered Person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated; or

(5) has received or applied for funds at any time during the previous 12 months up to and including the date of the proposed or actual receipt of the item or service from either (i) the Covered person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated.

(e) *Ministerial Matter* shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion.

(f) *Official Activity* shall mean a Covered Person's attendance or Service at a meeting, conference, seminar, convention, or professional program that is part of his or her official duties and benefits the Covered Person's State Agency.

(g) *Official Activity Expense Payment* shall mean a payment or reimbursement for the cost of attendance, registration, travel, food or lodging related to a Covered Person's Official Activity as defined in subdivision (f) of this section. Official Activity Expense Payment does not include (1) any reimbursement for such costs when they have been bargained for by a State agency; or (2) a Service Payment.

(h) *Official Activity Approval* shall mean a completed and signed record created by the Approving Authority in accordance with section 931.2(c) of this Part.

(i) *Service* shall mean any action or service performed by a Covered Person. Such action may include, but is not limited to, delivering a speech, writing, or publishing an article, or making a presentation.

(j) *Service Payment* shall mean any payment of money made in consideration for a Service provided.

(k) *State Agency* shall mean any State department, or division, board, commission, or bureau of any State department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the Governor, or the State University of New York or the City University of New York, including all their constituent units except (1) community colleges of the State University of New York and (2) the independent institutions operating statutory or contract colleges on behalf of the State.

(l) *State Officer or Employee(s)* shall mean:

(1) Statewide Elected Officials;
(2) Heads of civil departments and State departments and their respective deputies and assistants other than members of the board of regents of the State University of New York who receive no compensation or who are compensated on a per diem basis;
(3) Officers and employees of Statewide Elected Officials;
(4) Officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other State Agencies other than officers of such boards, commissions or councils who receive no compensation or who are compensated on a per diem basis;
(5) Employees of public authorities (other than multi-state authorities), public benefit corporations, and commissions at least one of whose members of such public authorities, public benefit corporations, and commissions is appointed by the governor; and
(6) Members or directors of public authorities (other than multistate authorities), public benefit corporations and commissions identified in section 931.2(l)(5) who receive compensation on other than a per diem basis.

(m) *Statewide Elected Official(s)* shall mean the Governor, Lieutenant Governor, Comptroller, or Attorney General.

931.2 Approval Procedures.

(a) An Official Activity Expense Payment or a Service Payment must be approved by the Covered Person's Approving Authority in accordance with this Part.

(b) Within a reasonable period of time prior to engaging in the Official Activity, a Covered Person shall submit to his or her Approving Authority a written request to approve an Official Activity Expense Payment or Service Payment.

(c) The Approving Authority shall review a request for an Official Activity Expense Payment or Service Payment in accordance with the procedures and conditions set forth

in section 931.3 and 931.4 of this Part. If approved, the Official Activity Approval shall contain the information set forth in (1) through (5) of this subdivision:

(1) The name of the Covered Person to whom, or on behalf of whom, the Official Activity Expense Payment or Service Payment is offered;

(2) Identity of the offeror and nature of the offeror's business;

(3) A detailed description of the Official Activity or Service, including date and location;

(4) The amount of the Official Activity Expense Payment and, where applicable, an itemization of costs for the attendance, registration, travel, lodging, and meals, and the amount of a Service Payment, if any; and

Comment [b2]: Unsure what this is meant to cover.

(5) A statement that the Approving Authority has approved the Official Activity Expense Payment and Service Payment, if any, in accordance with the conditions set forth in section 931.3 of this Part.

(d) The Approving Authority shall retain all completed and signed Official Activity Approvals for a period of three years from the date of the Official Activity for which an Official Activity Expense Payment or Service Payment, if any, is offered and shall be made available to the Commission upon request.

(e) The Approving Authority shall provide the Covered Person with a copy of the Official Activity Approval.

931.4 Conditions for Approval.

(a) An Approving Authority may approve a request for an Official Activity Expense Payment or Service Payment provided the following conditions are met:

(1) The Official Activity Expense Payment or Service Payment covers only the period of time that the Covered Person is reasonably required to be present for such Official Activity;

(2) The Official Activity Expense Payment or Service Payment is offered by or on behalf of an Interested Source, all of the following criteria must be met:

(i) It is not reasonable, under the circumstances, to infer that the Official Activity Expense Payment or Service Payment was intended to influence the Covered Person in the performance of his or her official duties.

(ii) The Official Activity Expense Payment or Service Payment could not, under the circumstances, reasonably be expected to influence the Covered Person in the performance of his or her official duties.

(iii) The Official Activity Expense Payment or Service Payment is not, under the circumstances, intended as a reward for any official action on his or her part.

(3) The Official Activity Expense Payment, if not made by the offeror, could be lawfully paid by the State Agency in accordance with its travel policy.

(4) The Official Activity Expense Payment is made on behalf of the Covered Person at a rate not greater than the rate at which the State Agency would pay or reimburse the Covered Person under its travel policy.

(5) The Approving Authority determines that the offeror is not being used to conceal that the Official Activity Expense Payment or Service Payment is actually offered or paid by an Interested Source.

(6) The Official Activity and the corresponding Official Activity Expense Payment or Service Payment is consistent with Public Officers §74.

(b) If a Covered Person's Official Activity includes a Service and an offer for a Service Payment, in connection with such Official Activity, the Approving Authority shall approve the Service Payment provided such Official Activity comports with the conditions set forth in section 931.4 of this Part. The Approving Authority shall direct that such Service Payment shall be made directly to the general fund of the State or to such fund as is appropriate for a public authority, public benefit corporation, or commission not funded through State general fund appropriation.

931.4 Minimum Requirements.

Nothing contained in this Part shall prohibit any State Agency from adopting or implementing its own rules, regulations, or procedures governing Official Activity Expense Payments for Official Activities that are more restrictive than the requirements of this Part.

931.5 Enforcement.

The Commission is authorized pursuant to Executive Law §94 to investigate possible violations of Public Officers Law §73 and §74 and their corresponding regulations and take appropriate action as authorized in these statutes.

931.6 Reporting.

Any Covered Person who is required to file a financial disclosure statement pursuant to §73-a of the Public Officers Law shall report any Official Activity Expense Payment in excess of $1,000, (or all Official Activity Expense Payments the aggregate total of which exceed $1,000, received from a single offeror) in his or her statement of financial disclosure for the applicable year.

PROPOSED RULE – PART 930

Title 19 NYCRR Part 930 is amended to read as follows:

OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS OF THE STATE OF NEW YORK

TITLE 19. DEPARTMENT OF STATE

CHAPTER XX. JOINT COMMISSION ON PUBLIC ETHICS

TITLE 19 NYCRR PART 930: HONORARIA

930.1 Purpose and Effect of Regulations.

(a) The purpose of these regulations is to establish the procedures and conditions for approval and acceptance of Honoraria by specified New York State officials and employees.

(b) The effect of these regulations is to supercede prior regulations and any Advisory Opinions or other guidance issued by predecessor agencies to the Joint Commission on Public Ethics to the extent such Advisory Opinions and guidance are inconsistent with this Part.

930.2 Definitions.

(a) *Approving Authority* for a State Officer or Employee shall mean the head of a State agency or appointing authority, as appropriate, or his or her designee. In the case of a Statewide Elected Official, the head of a Civil Department and the head of a State Agency, it shall mean the New York State Joint Commission on Public Ethics.

(b) *Civil Department* shall mean any of the departments listed herein: Agriculture and Markets, Civil Service, Comptroller, Corrections and Community Services, Economic Development, Education, Environmental Conservation, Executive, Financial Services, Health, Labor, Law, Motor Vehicles, Office of Children and Family Services, Office of Mental Health, Office for People with Developmental Disabilities, Office of Temporary and Disability Assistance, Public Service, State, Taxation and Finance, and Transportation.

(c) *Commission* shall mean the New York State Joint Commission on Public Ethics.

(d) *Covered Person(s)* shall mean:

(1) Head of a Civil Department as defined in subdivision (b) of this section;

(2) State Officer or Employee as defined in subdivision (j) of this section;

(3) Statewide Elected Official as defined in subdivision (k) of this section;

(e) *Honorarium* shall mean:

(1) 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.

(2) Honorarium shall not mean a payment provided to a Covered Person who provides services for or acts on behalf of an employee organization certified or recognized under Article 14 of the Civil Service Law to represent such Covered Person.

(f) *Honorarium Approval* shall mean a record created by the Approving Authority in accordance with section 930.3(c) of this Part.

(g) *Interested Source* shall mean any person or entity, on his or her own behalf or on behalf of any entity, that satisfies any one of the following:

(1) is regulated by, or negotiates with, appears before in other than a Ministerial Matter, seeks to contract with or has contracts with, or does other business with: the Covered Person in his or her official capacity; (ii) the State Agency with which a Covered Person is employed or affiliated; or (iii) any other State Agency when the Covered Person's agency is to receive the benefits of the contract; or

(2) is required to be listed on a statement of registration pursuant to §1-e(a)(l) of article 1-A of the Legislative Law and lobbies or attempts to influence actions, decisions, or policies of the State Agency with which the Covered Person is employed or affiliated; or

(3) is the spouse or unemancipated minor child of any individual satisfying the requirements of section 930.2(g)(2); or

(4) is involved in any action or proceeding, in which administrative and judicial remedies thereto have not been exhausted, and which is adverse to either: (i) the Covered Person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated; or

(4) has received or applied for funds at any time during the previous twelve months up to and including the date of the proposed or actual receipt of the item

or service from either the Covered Person in his or her official capacity; or (ii) the State Agency with which the Covered Person is employed or affiliated.

Comment [b1]: Likely should read "honorarium"

(h) *Ministerial Matter* shall mean an administrative act carried out in a prescribed manner not allowing for substantial personal discretion.

(i) *State Agency* shall mean any Civil Department; State department; or division, board, commission, or bureau of any State department or Civil Department; any public benefit corporation, public authority or commission at least one of whose members is appointed by the Governor. State agency shall also include the State University of New York or the City University of New York, including all their constituent units except (1) community colleges of the State University of New York and (2) the independent institutions operating statutory or contract colleges on behalf of the State.

(j) *State Officer or Employee* shall mean:

(1) Statewide Elected Officials;

(2) Heads of State departments and their deputies and assistants, other than members of the board of regents of the State University of New York who receive no compensation or are compensated on a per diem basis;

Comment [b2]: Suggest substituting "agencies" for "departments," as it is more inclusive

(3) Officers and employees of Statewide Elected Officials;

(4) Officers and employees of State departments, boards, bureaus, divisions, commissions, councils or other State Agencies other than officers of such boards, commissions or councils who receive no compensation or who are compensated on a per diem basis;

(5) Employees of public authorities (other than multi-state authorities), public benefit corporations, and commissions at least one of whose members of such public authorities, public benefit corporations, and commissions is appointed by the governor; and

(6) Members or directors of public authorities (other than multistate authorities), public benefit corporations and commissions identified in section 930.2(j)(5), who receive compensation on other than a per diem basis.

(k) *Statewide Elected Official(s)* shall mean the Governor, Lieutenant Governor, Comptroller, or Attorney General.

930.3 Certain Covered Persons Prohibited from Receiving Payment for Speeches.

Notwithstanding any other provision of this Part and pursuant to Public Officers Law §73(5-a)(b), no Statewide Elected Official or any head of a Civil Department shall, directly or indirectly, solicit, accept, or receive any payment made in consideration for

any speech given at a public or private conference, convention, meeting, social event, meal, or like gathering.

930.4 Approval Procedures.

(a) An Honorarium must be approved by the Covered Person's Approving Authority in accordance with this Part.

(b) Within a reasonable period of time prior to the performance of the service for which an Honorarium is offered, or to the receipt of the Honorarium, a Covered Person shall submit to his or her Approving Authority a written request for approval to accept the Honorarium.

(c) The Approving Authority shall review ~~and approve~~ a request to accept an Honorarium in accordance with the procedures and conditions set forth in sections 930.3 and 930.4 of this Part. If the conditions are met, ~~T~~the Honoraria Approval determination shall contain the information set forth in (1) through (5) of this subdivision:

Comment [b3]: "and approve" seems to imply that all requests will be approved.

(1) The name of the Covered Person accepting the Honorarium;

(2) Identify of the offeror and nature of the offeror's business;

(3) A detailed description of the service for which the Honorarium is offered, including the date and location where the service will be performed;

(4) The amount of the Honorarium and, where applicable, and itemization of amounts paid for the service, attendance, registration, travel, lodging, and meals; and

(5) A statement that the Approving Authority has approved the Honorarium in accordance with the conditions set forth in section 930.5 of this Part.

Comment [b4]: Likely should read "930.4"

(d) The Approving Authority shall retain all completed and signed Honorarium Approvals for a period of three years from the receipt date of the Honorarium and shall be made available to the Commission upon its request.

(e) The Approving Authority shall provide the Covered Person with a copy of the Honorarium Approval.

930.4 Conditions for Approval.

(a) An Approving Authority may approve a request to accept an Honorarium provided the following conditions are met:

(1) State personnel, equipment, and time are not used in preparing the service for which an Honorarium is offered;

(2) No State funds (including funds from any New York State public authority or any public benefit corporation) are used to pay the Covered Person's attendance, registration, travel, lodging, or meal expenses related to the service for which an Honorarium is offered;

(3) If the service is to be performed during the Covered Person's official work day, he or she must charge accrued leave (other than sick leave) to perform such service;

(4) If the Honorarium is offered by or on behalf of an Interested Source, all of the following criteria must be met:

(i) It is not reasonable, under the circumstances, to infer that the Honorarium was intended to influence the Covered Person in the performance of his or her official duties.

(ii) The Honorarium could not, under the circumstances, reasonably be expected to influence the Covered Person in the performance of his or her official duties.

(iii) The Honorarium is not, under the circumstances, intended as a reward for any official action on his or her part;

(5) The Approving Authority determines that the offeror is not being used to conceal that the Honorarium is actually offered or paid by an Interested Source; and

(6) Performing the service for which the Honorarium is offered and accepting the Honorarium do not violate Public Officers Law §74.

930.5 Minimum Requirements.

Nothing contained in this Part shall prohibit any State Agency from adopting or implementing its own rules, regulation or procedures governing Honoraria that are more restrictive than the requirements of this Part.

930.6 Exemption.

A member of the faculty (including an adjunct member of the faculty) at the State University of New York and the City University of New York, including all their constituent units except community college of the State University of New York and the independent institutions operating statutory or contract colleges on behalf of the State, and a State Officer or Employee serving in the title of *Research Scientist, Cancer Research Scientist, Research Physician,*

Comment [b5]: Probably should read "colleges"

Research Psychiatrist or Psychiatrist, is exempt from all the provisions and requirements in this Part, with the exception of sections 930.7 and 930.8, provided the service performed by such member of the faculty is within the subject matter of his or her official academic discipline.

930.7 Enforcement.

The Commission is authorized pursuant to Executive Law §94 to investigate possible violations of Public Officers Law §73 and §74 and their corresponding regulations and take appropriate action as authorized in these statutes.

930.8 Reporting.

Any Covered Person who is required to file a financial disclosure statement pursuant to §73-a of the Public Officers Law, including those persons who are exempt from the limitations on the receipt of Honorarium pursuant to section 930.6 of this Part, shall report any Honorarium in excess of $1,000, (or all Honoraria the aggregate total of which exceed $1,000 received from each offeror) in his or her financial disclosure statement for the applicable year.

THOMAS P. DiNAPOLI
STATE COMPTROLLER

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ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

September 30, 2013

To: Joint Commission on Public Ethics

From: Barbara F. Smith, Special Counsel for Ethics

Subject: Comments on Proposed JCOPE Regulations
Part 930: Honoraria

On behalf of the Office of the State Comptroller, I offer these comments on the proposed Honoraria Regulations published by the Joint Commission on Public Ethics (JCOPE) pursuant to power granted in Executive Law §94(17)(a).

As with the Gift Regulations, JCOPE has abandoned the current bar against receipt of honoraria from disqualified sources, now labeled "Interested Sources," substituting instead the test that permits a Covered Person to accept an honorarium from an Interested Source under circumstances where it could not be reasonably inferred that the honorarium was intended to influence or reward official action. For the reasons set forth in my memorandum discussing the proposed Gift Regulations, in my opinion, maintaining the long-standing bar would be preferable. Concern remains whether the practical impact of this change will be a perception that standards to which Covered Persons are held are weakening. At least the regulation involves the Agency's Approving Authority to review the circumstances surrounding the offer of the honorarium.

The attached marked-up copy of the regulations shows additional, specific comments. I may be reached at (518) 408-3855, if you have any questions.

Attachment

THOMAS P. DiNAPOLI
STATE COMPTROLLER

110 STATE STREET
ALBANY, NEW YORK 12236

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

September 30, 2013

To: Joint Commission on Public Ethics

From: Barbara F. Smith, Special Counsel for Ethics

Subject: Comments on Proposed JCOPE Regulations
Part 931: Official Activity Expense Payment and Service Payment Regulations

On behalf of the Office of the State Comptroller, I offer these comments on the proposed Regulations governing "Official Activity Expense Payments and Service Payments to the State: Limitations and Approval," published by the Joint Commission on Public Ethics (JCOPE).

This set of proposed regulations is adapted from current regulations that address permissible travel expense reimbursement and payments in lieu of honoraria.

I urge clarification of how to interpret/reconcile Part 931 with Part 933, both of which address complimentary attendance at a Widely Attended Event. Complimentary attendance (waiver of all or part of a registration fee, including food, refreshments, and entertainment) is excluded from the definition of a gift (by statute), yet Gift Regulations Part 933.4(a)(7) sets forth a process requiring prior written approval to be secured from the Approving Authority by the Covered Person before accepting such an offer. A parallel process which seems to address the same circumstances is described in Part 931.2 (c), regarding Official Activity Expense Payments for payment or reimbursement for the cost of attendance, registration, (travel), food or (lodging) relating to official activities (travel and lodging would be additional considerations under these regulations). While I commend the concept that the Approving Authority weigh in on the permissibility of acceptance of complimentary attendance, it would benefit the regulated community if there were a single source for resolution of the question of permissibility for accepting complimentary attendance.

Further, Part 931.2, defines "Official Activity Expense Payment" to mean "a payment or reimbursement for the cost of attendance, registration, travel, food or lodging" related to a Covered Person's attendance at a conference, seminar, convention or professional program that is part of his/her State duties and benefits the agency. One could interpret "complimentary attendance" at a Widely Attended Event – where no actual payment or reimbursement by the

sponsor/offeror occurs, merely no charge made to the State agency or individual attending the event – as not covered under this definition, since no *payment* or *reimbursement* is made. If this interpretation accurately interprets the definition, I recommend either a specific amendment to the definition with a clarification, or a further explanation by JCOPE upon adoption of the regulation.

One final matter, which I raise for your consideration, relates to Part 931.7 "Reporting." The proposed Part 931.7, states:

> Any Covered Person who is required to file a financial disclosure statement . . . shall report any Official Activity Expense Payment in excess of $1,000 (or all Official Activity Expense Payments the aggregate total of which exceed $1,000 received from a single offeror) in his or her statement of financial disclosure for the applicable year.

(This provision currently applies only to reimbursement for travel expenses.) Service Payments are excluded from financial disclosure statement ("FDS") reporting by the related Covered Person, inasmuch as the funds received are directed to the General Fund of the State or such fund as is appropriate for public authorities or other entities not funded through State general fund appropriations.

I question whether it is appropriate for a Covered Person to have to report on his/her FDS, a payment or reimbursement for the cost of attendance, registration or food related to Official Activity, where there was no payment or reimbursement involved. In such a scenario, there would not have been a payment or reimbursement of a personal, out-of-pocket expense that the Covered Person received from the external source. Or, if there were a payment or reimbursement by a sponsor, the "beneficiary" of that largesse was the State agency, which did not have to allocate funds for the Covered Person's attendance or participation.

The attached marked-up copy of the draft regulations shows additional, specific comments. I may be reached at (518) 408-3855, if you have any questions.

Attachment