

**MINUTES OF THE PUBLIC SESSION OF THE
SEPTEMBER 24, 2013
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
HELD AT THE COMMISSION'S OFFICE LOCATED AT
540 BROADWAY
ALBANY, NEW YORK**

Present:

Chair: Daniel J. Horwitz

Members:

David Arroyo (*via* Teleconferencing)
Hon. Joseph Covello
Hon. Vincent DeIorio
Mitra Hormozi (*via* Teleconferencing)
Marvin E. Jacob (*via* Skype)
Seymour Knox, IV
Gary J. Lavine
David A. Renzi
Hon. Renee R. Roth
George H. Weissman
Ellen Yaroshefsky

Members

Absent:

LaShann DeArcy
Hon. Mary Lou Rath

Staff:

Monica J. Stamm, Chief of Staff and Deputy Counsel
Jeannine Clemente, Director of Administration
Robert Cohen, Special Counsel and Director of Ethics and Lobbying
Compliance
Martin L. Levine, Director of Audit and Review and Senior Counsel
John T. Milgrim, Director for External Affairs
Letizia Tagliafierro, Director of Investigations and Enforcement
Shari Calnero, Senior Counsel and Manager of Training
Louis Manuta, Associate Counsel
Deborah Novak, Executive Assistant
Terence Mulderrig, Senior Investigator
Jack Patterson, Confidential Investigator
Lori Donadio, Legal Assistant

I. OPENING STATEMENT

Chair Horwitz opened the Public Session and welcomed Hon. Renee R. Roth, the new Commissioner appointed by the Speaker of the Assembly to replace Commissioner Patrick Bulgaro.

II. MINUTES - PUBLIC SESSION – JULY 30, 2013

Monica J. Stamm, Chief of Staff and Deputy Counsel, requested that the minutes be corrected by making the following changes: (1) indicate that Commissioner Mitra Hormozi was present at the Public Session of the meeting on July 30, 2013 and (2) on page 6, after the discussion “Update on Pending Regulations,” add that “Commissioner Hormozi was not present for the remainder of the meeting.”

Upon motion made by Commissioner Weissman, which was seconded by Commissioner Covello, the Minutes from the Public Session of the July 30, 2013 Commission Meeting, as amended, were approved by unanimous vote.

III. REPORT FROM STAFF

Update on Roundtable discussions with Regulated Community

Monica Stamm discussed that the Commission intends to continue this program and will announce upcoming roundtable discussions via e-blast and posting on JCOPE’s website.

Update on Annual Financial Disclosure Statements

Monica Stamm discussed that staff is preparing for the filing of annual financial disclosure statements for academic filers. While State officers and employees and legislative officers and employees must file by May 15, academic filers have until November 15. Over the next few weeks, staff will be engaged in the process of identifying filers and notifying them of their filing obligations.

Update on Training Program

Monica Stamm provided an update on the Commission's training program. The education resource group continues to focus on the mandatory comprehensive ethics training for all FDS filers. JCOPE recently announced that it will hold additional comprehensive ethics trainings on October 8th, November 14th, and December 11th. These sessions are open to the FDS filers who still need to complete their mandatory training, as well as to new hires who are subject to the filing requirement. The instructions for how to register for these trainings are on JCOPE's website. Staff also is developing its online programming through the State Learning Management System and hopes to be able to roll out online programs early next year.

Update on Lobby Data

Monica Stamm provided an update on the lobby data. As announced earlier this year, for the first time, JCOPE made available on its website a downloadable spreadsheet with six years of lobbying data. Staff anticipates that it will update the spreadsheet shortly with the data from the first half of 2013.

IV. REGULATIONS

Update on Pending Regulations

Monica Stamm provided an update on various regulations. The Commission previously approved four sets of proposed regulations relating to gifts, honoraria and related items. These regulations were published in the State Register in August. The 45-day public comment is ongoing and will end on Monday, September 29. Staff will review any comments and continue to have discussions with the regulated community. Staff anticipates that it will present the regulations to the Commission shortly thereafter. In addition, staff continues to develop drafts of public service announcement regulations, which have not yet been presented to the Commission for approval. Staff has been reviewing comments submitted through an informal process and having discussions with the regulated community. Staff hopes to finalize the draft regulations soon and present them to the Commission for consideration and submission to the SAPA process.

Proposed Amended Source of Funding Regulations

Chair Horwitz discussed that, in light of issues raised by a number of Commissioners at the last meeting about JCOPE's source of funding regulations -- particularly, the process and standard for considering exemptions to the disclosure requirements -- staff has prepared and circulated a draft of proposed amended regulations for the Commission's consideration for adoption and immediate effect on an emergency basis. Staff recommends that the cleanest way to effectuate the change the Commission seeks -- to make the materials and discussion concerning the exemption applications public -- is to delete former Part 938.8, Confidentiality of Exemption Related Materials, which made the materials and discussion confidential. In addition, some Commissioners have questioned whether to consider changes to Part 938.4, which provides the Standard for Reviewing an Application for Exemption. The current standard in the regulation generally is a showing of a reasonable probability of harm. Some Commissioners have suggested the standard should be changed to a substantial likelihood of harm, to conform to the standard in the statute.

Commissioner Yaroshefsky agreed that, presumptively, the exemption applications should be a matter of public record, as Commissioner Renzi suggested at the last meeting. However, Commissioner Yaroshefsky stated that the Commission should retain some discretion to make exceptions. For example, if there is an ongoing confidential federal investigation relating to a threat or harassment of a donor, the Commission needs the ability to consider that information confidentially before making a determination that it should become part of the public record. Based on discussions with staff, an alternative amended regulation could essentially make exemption applications public unless there is an ongoing investigation by a government body or some other extraordinary circumstances, such as, an unwarranted invasion of personal privacy.

There was further discussion among the Commissioners. Some Commissioners considered whether allowing an applicant to submit a redacted exemption application would satisfy this concern. Others felt that Commissioners would need to understand

the basis for the redaction to determine whether it is appropriate and that the Commission should receive full versions of the exemption applications. The Commissioners also discussed the process for seeking that a portion of the exemption application be kept confidential, recognizing that the balance should be made public.

Commissioner Renzi discussed the Chair's additional suggestion about changing the standard of review for exemptions to substantial likelihood of harm and whether the Commission had acted beyond its authority in departing from the statutory standard. Commissioners discussed how this would affect pending exemption applications.

Staff explained that if the Commission adopts the amended regulations, the entities with applications pending could resubmit under the new standard with notice that the application would be made public. Staff also explained that if the Commission adopts amended regulations, the regulations would be subject to the full SAPA process. The Commission may, however, vote to have the regulations become effective on a so-called "emergency basis," meaning that they will become effective as soon as they are submitted for publication in the State Register. Under this scenario, staff explained that the Commission may adopt changes to the regulations now, and at the next meeting, the Commission would be able to consider the pending exemption applications under the amended regulations.

Commissioner Roth asked about the comments submitted by NYCLU, pursuant to SAPA, in which it contended that the substantial likelihood standard in the statute was legally infirm. Monica Stamm explained that NYCLU had argued, based on constitutional case law in a slightly different context, that the appropriate standard is reasonable likelihood of harm. Based on NYCLU's comments and other comments, this issue was presented to the Commission earlier this year, and the Commission adopted the standard of reasonable likelihood. Any discussion relating to potential litigation or litigation strategy, should be considered by the Commission in Executive Session, consistent with the meeting guidelines adopted by the Commission.

Chair Horwitz summarized the issue before the Commission: On the one hand, there is a question as to whether the Commission has the authority to depart from the statute in framing the regulation. On the other hand, to the extent that the Commission takes action and amends the standard, there is the possibility that a member of the regulated community may file whatever litigation it believes is in its interests.

The Commissioners turned to the specific proposals. Director of Ethics and Lobbying Compliance Rob Cohen explained that staff proposed deleting Part 938.8 with the idea that the client filers who are seeking an exemption would then tailor their submissions knowing that the materials would be made public. Based on the few applications JCOPE received to date, this would not appear to be a significant impediment for any of the client filers. Commissioner Weissman expressed concern about receiving over redacted applications and that he would prefer instead that full applications are submitted and the Commission determines if anything constitutes an unwarranted invasion of personal privacy or other specific circumstances justifying confidential treatment. Monica Stamm discussed that staff was hoping to avoid a two-step, two meeting procedure for making determinations on exemption applications, such as a procedure that required notice to the applicant of the Commission's determination on whether application material requires confidential treatment. Commissioner Weissman suggested that the Commission could make a determination using its best judgment as to what should be redacted and then return to the public session. The applicant would be on notice based on the regulation that the material may be made public. Monica Stamm discussed that staff could also develop procedures, including an instruction form posted on JCOPE's website, to accomplish this.

Commissioner Yaroshefsky presented and discussed some language for a replacement to Part 938.8 which would allow for confidential treatment if necessary. Chair Horwitz discussed there should be no question that this Commission expects applicants to understand that these exemptions are going to be filed publicly and considered publicly. Only if the narrow set of circumstances embodied in this

proposed regulation are met, will the Commission have discretion to keep some portion of the application confidential to be considered in Executive Session.

After further discussion among the Commissioners, Monica Stamm clarified that there are two separate amendments on the table, one is to delete 938.8 and replace it with language that makes it clear that the presumption is that the material will be made public but the Commission will have discretion on requests to consider keeping some portion confidential if the circumstances merit it. The other proposed amendment is to change the standard for considering the entire application for an exemption back to the statutory language, which is substantial likelihood of harm.

Commissioner Lavine discussed a third proposal to require that client filers seeking an exemption provide the source of funding information to JCOPE, but that it would be kept confidential if the exemption application is granted. He further suggested that it should be a condition of an exemption. There was discussion among the Commissioners. Chair Horwitz agreed that Commissioner Lavine's suggestion is consistent with the spirit of what the Commission is trying to do to increase transparency, but stated that there are some legal issues that require analysis. Monica Stamm discussed that, given the earlier discussion the Commission had about whether it could exceed the statutory standard for an exemption, this proposal also seems to be inconsistent with the statutory language. The relevant provision in the statute, Section 1-h of the Lobbying Law, which deals with bi-monthly reports, states that the source of funding disclosure requirements will not apply to certain 501(c)(4) organizations. Commissioners discussed whether Commissioner Lavine's proposal could be implemented by regulation or would require legislative reform. There was further discussion among the Commissioners about whether this proposal would undermine the purpose of the exemption. It was decided that further analysis by staff was warranted before the Commission considers Commissioner Lavine's proposal.

A motion to amend Part 938.4 of the source of funding regulations to replace reasonable probability with substantial likelihood, consistent with the statutory

standard for exemptions, was made by Commissioner Yaroshefsky, seconded by Commissioner Covello, and approved by unanimous vote. Upon motion by Commissioner Weissman, seconded by Commissioner Renzi, the proposed amended regulation was adopted by unanimous vote on an emergency basis to go into effect upon submission to the State Register.

A motion was made by Commissioner Covello to amend Part 938.8 of the source of funding regulations to read as follows:

The Commission shall publicly disclose the fact that a Client Filer has submitted one or more applications for an exemption or that one or more of a Client Filer's requests for an exemption has been granted or denied. Information submitted in connection with an application for an exemption or in support of an appeal from a denial of an exemption shall be publicly available. Notwithstanding the foregoing, Executive Law §94(19)(a)(5), Legislative Law §1-s, and any corresponding regulations, the Commission may, in its discretion, grant a request from the Client Filer to keep confidential certain exemption-related information when particular circumstances merit confidential treatment of the information including but not limited to an ongoing investigation by a governmental body or an unwarranted invasion of personal privacy. The Commission may, nevertheless, disclose such information: (i) to the judicial hearing officer assigned to the appeal; (ii) to a court in a judicial review; or (iii) in response to any subpoena or court order.

The motion was seconded by Commissioner Roth and approved by unanimous vote. A motion made by Commissioner Yaroshefsky, which was seconded by Commissioner Roth, to adopt the Proposed Amended Source of Funding Regulations on an emergency basis to become effective upon submission for publication in the State Register. The motion was approved by unanimous vote.

Commissioners discussed that staff could work with a subcommittee to resolve the procedure for submitting and reviewing exemptions and handling the pending applications.

V. NEW AND OTHER BUSINESS

There was no new or other business.

VI. MOTION TO ENTER INTO EXECUTIVE SESSION PURSUANT TO EXECUTIVE LAW §94(19)(b)

A motion to enter into Executive Session pursuant to Executive Law §94(19)(b) was made by Commissioner DeIorio, seconded by Commissioner Covello, and was approved by unanimous vote.

VII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

Chair Horwitz reported that during the Executive Session, the Commission considered several investigative matters, including authorizing communications and closing certain investigative matters, and the Commission granted a request pursuant to Section 73(8-b) of the Public Officers Law.

VIII. MOTION TO ADJOURN THE PUBLIC MEETING

Upon motion made by Commissioner Roth, seconded by Commissioner Covello, which was approved by unanimous vote, the meeting was adjourned.