



May 17, 2023

VIA EMAIL

Commissioners
NYS Commission on Ethics and Lobbying in Government

Re: Recommendations to Improve Code of Conduct for Commissioners

Dear Commissioners,

We ask you to make changes to the [Draft Code of Conduct for Commissioners](#) to increase public confidence regarding the independence of Commissioners from their appointing authorities, and to provide clearer guidance regarding recusals and abstentions from voting.

We appreciate that you have discussed the draft code in public meetings of the Commission, and that a draft of the code was made public before a final vote will be taken. In the future, we ask that you specifically reach out to stakeholders for comment regarding policy changes, as is done for regulations. While this policy does not require public comment under the State Administrative Procedures Act (SAPA), its content is arguably equally as important as changes to the Commission's formal regulations.

We ask you to consider the following recommendations:

- 1. Communications with a Commissioner's appointing authority** – New Yorkers are rightly skeptical of the independence of the Commission, which should do as much as it can to show independence in fact and appearance. Creating exceptions to a rule that Commissioners should not communicate with their appointing authority about the work of the Commission opens the door to cynicism and doubt about what the actual practice will be. A more prophylactic rule is necessary and workable. For example, the common ethical rule that a law firm may not act adversely to a former client of the firm in a substantially related matter is an example of a prophylactic rule designed to leave no possibility for the misuse of confidential information. So too would a strong bar on communication with a Commissioner's appointing authority remove even the appearance of undue influence. Moreover, the phrase *ex parte*, though it is a known technical term, should not be used because it is confusing to the general public and unnecessarily limiting.

- **Recommendation:** We recommend that the proposed rule be amended to read as follows:
 - i. No member shall engage in communication between them and the selection member (or their representative) who nominated them to the Commission with respect to the work of the Commission. A selection member may communicate in writing with the Commission as a whole and verbally with the Commission chair who shall report the fact and substance of such communication to the entire Commission in writing. The communication or the Chair's report thereof shall be made part of the record of any relevant matter or of the Commission's work to which it relates.

- 2. **Recusals** – While the procedures for recusals on Page 3 are detailed and provide enough specificity with regard to sharing of information between staff and Commissioners, the procedures do not specify that recusals be recorded in minutes of Commission meetings.
 - **Recommendation:** Require written documentation of recusals in Commission meeting minutes, including the reason for the recusal, both in minutes recording public votes, and non-public votes taken in executive session. We understand that minutes taken in executive sessions may not be subject to public disclosure until adjudications are complete.

- 3. **Abstentions** – The policy regarding abstentions on Page 5 provides that a Commissioner may abstain when they believe they “have insufficient information upon which to base a vote to act in an official way.” We understand that there may be narrow circumstances under which this should apply: for example, a Commissioner could not vote to approve meeting minutes for a meeting they did not attend. While the policy states that members should refrain from abstaining, since they have a duty to express their opinion, there should be further narrowing of this allowance and mention of how votes are tallied.
 - **Recommendations:**
 - i. The Code should specify that Commissioners should exercise due diligence with regard to reviewing information and accompanying facts/documentation brought before them in support of a specific Commission action. If a Commissioner believes that a motion does not have adequate information to back it up, they should vote no, or move to table the matter for a future meeting.
 - ii. It should be specified that abstentions should still count towards a quorum; abstentions are generally considered a “no” vote for the purposes of understanding whether a motion passes or fails.
 - iii. The language could be strengthened regarding the “duty [of a Commissioner] to express their opinion” – the work of Commissioners is not merely to express their opinions, but to hold public officials accountable, improve confidence in government, and ensure ethical behavior of state government.

4. Political activities – The prohibition on political activities should include more specificity, expand to certain campaigns for local and federal office, and provide scenarios as examples of what is not permissible. Specifically, we believe contributions should also be barred at the local level, given the Commission’s regulation of local lobbying activity.

➤ **Recommendations:**

- i. The prohibition on direct or solicited campaign contributions should be expanded to contributions made to current incumbent state office holders under regulation of the Commission (Governor, Lt. Governor, Attorney General, Comptroller, State Legislators) who are seeking federal office, as well as contributions to all candidates running for local office in New York State.
- ii. Commissioners should be barred from attending fundraisers held by candidates for state and local office, as well as for those held by incumbent state officeholders seeking federal office, whether or not attendance is free, complimentary, or paid for by another party.

We note that, where appropriate, corresponding amendments could be made to the [Draft Commission Meeting Guidelines](#).

Thank you for your consideration. We are available to discuss these recommendations with you should you have any questions.

Sincerely,

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