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## NYS Government Ethics Agency Proposes to Restrict Campaign Fundraising

In late October 2015, the New York State Joint Commission on Public Ethics (JCOPE) released a draft Advisory Opinion that would overturn a nearly 20-year-old ethics opinion regarding political activities by public office holders and their employees. This proposal could have a significant impact on campaign fundraising practices for some New York State office holders and candidates.

### *Background*

New York's Public Officers Law's conflict of interest provisions have long been understood to restrict certain political activities by State officials. Namely, officials must refrain from any action that could create even an appearance of conflict when performing State duties. In 1998, the now-defunct State Ethics Commission issued an opinion interpreting these laws as barring State employees from "soliciting funds from any individual or business entity (1) which currently has matters before . . . [that employee or the unit the employee] supervises, (2) [which the employee] . . . has substantial reason to believe will have matters before [the employee or unit] in the foreseeable future, or (3) which had matters before . . . [the employee or unit] in the last twelve months." The Ethics Commission, however, expressly stated that these conflict of interest provisions *did not apply* to "Statewide elected officials running for re-election." The 1998 opinion also did not apply to legislators, as the former commission lacked authority to regulate the legislative branch. JCOPE's proposal would clarify the political activity restrictions, reverse the Ethics Commission's finding that the statewide elected officials are not subject to the prohibitions, and establish that the rules apply to all State officials – including legislators.

### *JCOPE's Proposed Advisory Opinion (AO) No. 15-0X*

The new rule, if adopted, would represent a departure from the 1998 Ethics Opinion. JCOPE's AO 15-0X proposes that the public officers conflict of interest provisions extend to all elected officials – regardless of whether they are statewide elected officials, or members of the legislature – "running for re-election when they are engaged in campaign fundraising activities." Moreover, JCOPE interprets the Public Officers Law as prohibiting statewide elected officials, State legislators, and individuals acting on behalf of such persons or their campaigns, "from directly soliciting or accepting a monetary or

in-kind campaign contribution from a person or entity which is the “**active subject of enforcement powers**” of the official or the official’s office.” The opinion defines “enforcement powers” narrowly, as “the authority to **investigate and prosecute alleged violations of law**” and provides as examples, “powers to issue subpoenas, audit the books and records of a person or entity, compel testimony, execute search warrants, and to initiate litigation or an adjudicatory proceeding on behalf of the public.” JCOPE expressly states that enforcement powers do not include an agency’s authority to regulate, supervise, or license individuals and entities. The power must be exercised in an effort to identify or punish wrongdoing.

Under this proposed rule, any individual or business entity – as well as officers of such entity, or individuals who own 10 percent or more in the entity (or 1 percent or more if the entity is publicly traded) – and the family members of such persons, being “investigate[d or] . . . prosecute[d for] alleged violations of law” may not be solicited for contributions or invited to campaign events that benefit the public official who or whose office is actively exercising enforcement powers with regards to the person or entity. If any such individual or entity makes an unsolicited contribution, or makes a contribution as a result of a mass mailing that did not intentionally target the entity or individual, and the elected official learns of the contribution from a prohibited source, the elected official must ensure that the contribution is returned. Moreover, to the extent that a contributor becomes the active subject of an official’s enforcement powers within 12 months of making the contribution, “the official must recuse himself from any participation in the matter.” Similarly, to the extent that the official exercised enforcement powers, “within twelve months following the final resolution of an enforcement action or litigation an elected official may not knowingly solicit or accept contributions from the subject.”

It is possible that JCOPE intends for this Advisory Opinion only to apply to a fundraising prohibition when an elected official or the official’s office is investigating or prosecuting an individual or entity *for a potential violation of law*. The wording of the proposed Advisory Opinion, however, creates questions as to when the prohibition actually applies. Clearly the restriction would apply to an incumbent Attorney General. Similarly, the restriction would apply to the State Comptroller conducting a forensic audit to identify wrongdoing. If, however, the Comptroller is conducting a routine audit of an entity that receives state funding, it would appear that the restriction does not apply. The restriction likely also would extend to an incumbent Governor (particularly to if the Governor exercised investigative powers pursuant to the Executive Law) and State legislators, due to the definition of “enforcement powers” and that the Governor and legislators may exercise subpoena or auditing powers. However, the restriction would likely only apply to a member of the legislature if the legislator or a committee on which the legislator serves exercises “enforcement powers” to expose wrongdoing. If a legislative investigation is commenced to determine whether additional laws are necessary, it would seem that prohibition would not apply, even to legislators who exercise subpoena powers. The practical reality is that JCOPE’s proposal would have the most direct effect on an incumbent Attorney General or Comptroller seeking re-election, as those offices regularly engage in “enforcement” actions. In contrast, the Governor and legislators tend not to exercise those types of powers to investigate or prosecute wrongdoing.

Pursuant to this proposal, the risk and obligation to ensure that prohibited sources are not solicited, and that contributions from such prohibited sources are not accepted, would continue to rest with the public official, as well as the official’s campaign, not the potential contributor. Nonetheless, all individuals and entities that have historically made contributions in New York State, and could be subject to the enforcement powers of a state elected official, need to be aware of these potential changes in policy.

JCOPE is currently accepting “informal comments” regarding the [Proposed Advisory Opinion](#). Persons wishing to submit comments may send them to [jcope@jcope.ny.gov](mailto:jcope@jcope.ny.gov).

[Greenberg Traurig’s Government Law Compliance Practice](#) is available to assist with questions regarding New York State’s lobbying, ethics, and election laws, including this proposed Advisory Opinion. Greenberg Traurig has a broad range of experience in New York City and State, and provides advice to some of the world’s leading corporations, lobbying firms, public officials, candidates, advocacy organizations, and others who seek to navigate New York’s complex political law compliance requirements.

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