New York State Office of Children & Family Services

http://ocfs.ny.gov

Andrew M. Cuomo
Governor

Sheila J. Poole
Acting Commissioner

Capital View Office Park

52 Washington Street
Rensselaer, NY
12144-2834

VIA email: regs@jcope.com

April 17, 2014

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

Re: JCOPE Revised Regulatory Proposal:
19 NYCRR Part 933
JPE-33-13-00008-RP

Dear Mr. Manuta:

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

- 19 NYCRR 933.1(b): The scope of this proposed regulatory part remains unclear, especially with respect to listing prior Advisory Opinions superseded in whole or in part "…to the extent they are inconsistent with this Part." As set forth in the Revised Regulatory Impact Statement, the intent of the Part 933 is to "...provide a comprehensive set of [gift] requirements for Covered Persons." and eliminate the need to "...synthesize information from a variety of different sources, including the statutory language and advisory opinions from predecessor agencies." Requiring individuals and State agencies to obtain and consult various Advisory Opinions and then determine the "...extent to which they are inconsistent with [Part 933]" does not meet the intent set forth above, is unduly vague and may result in unintentional violations of the Public Officers Law (POL). Proposed Part 933 should be revised to clearly articulate which Advisory Opinions or portions thereof are superseded and

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which remain valid by superseding the Advisory Opinions and placing those provisions JCOPE wishes to maintain in the text of the regulation.

- 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, exempt from such registration or if a "Charitable Solicitation for the Relief of an Individual" has been filed. As this information is not generally or readily available to all persons, inadvertent violations of the POL may result.

- 19 NYCRR 933.2(l): 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 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.

- 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." It is suggested that the definition be revised to exclude administrative reviews or hearings or other routine agency proceedings.

- 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 933.2(q): While OCFS supports a consistent dollar figure ($15.00) for "nominal value", the language in this section noting that JCOPE will "generally deem" $15.00 or less of goods or services as nominal is vague, and may result in legal challenges and/or inadvertent violations of the POL. The section should be revised to read "*Nominal Value* means an item or services with a fair market value of fifteen dollars or less." The balance of Part 933 dealing with impermissible gifts makes it clear that even a gift of less than nominal value may not be acceptable pursuant to POL Section 74.

- 19 NYCRR 933.3(a) and (b): As previously noted (see OCFS' September 20, 2013 comments), these proposed regulatory provisions expand, without guidance, both exceptions to and inclusions 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 933.3(c): The revisions to this proposed regulatory provision eliminate the 12 month period for determining whether multiple gifts are acceptable. Does this mean that there is no time-limit applicable to the acceptance of otherwise permissible gifts? It is recommended that the prior 12 month guidance be retained, as it will avoid inadvertent violations of the POL, and/or allegations of arbitrary behavior or determinations on the part of state agencies and/or JCOPE.

- 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): This provision was revised to eliminate the requirement of prior agency approval for attendance at a Widely Attended Event, replacing it was a requirement that a State Employee simply "notify in writing" prior to attending such an event. The lack of any prior approval provisions can give rise to an inference that the State agency, once notified of an employee's intent to attend such an Event, is powerless to challenge the assertion that the event comes within the ambit of a Widely Attended Event. The "prior approval" provisions should be revised and reinstituted such a State agency could approve attendance for a specified group of employees (i.e., specific job titles or other criteria.)

- 19 NYCRR 933.4(a)(12): OCFS reiterates its objection to the deletion of gifts given for customary or special occasions, as is currently contained in JCOPE's Interim Guidance and Advisory Opinion 08-01. (See OCFS' comments September 25, 2013.) The deletion of this exception will require State employees and/or Agency Ethics Officers to delve into the nature of relationships between persons to determine whether, for instance, a contribution to a designated charity from a member of the public upon the death of a member of State employee's family is permissible.

- 19 NYCRR 933.4(a) (12)(ii) and (iii): These provisions exclude from permissible gifts those gifts for which the giftor "gave similar gifts to other Covered Persons" or "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. Similarly, a recipient of a gift may have no way of knowing whether other covered persons received the same or similar gifts from the giftor. This could result in inadvertent violations of the POL.

- 19 NYCRR 933.5: This provision duplicates that now found at 19 NYCRR 933.3(c) and should be deleted.

- Finally, the gift regulations still 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.

THOMAS P. DiNAPOLI
STATE COMPTROLLER

DIVISION OF LEGAL SERVICES
110 State Street – 14th Floor
Albany, NY 12236
Tel: (518) 474-3444
Fax: (518) 473-9104

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

April 18, 2014

To: Joint Commission on Public Ethics

From: Barbara F. Smith, Special Counsel for Ethics

Subject: Comments on Revised JCOPE Regulations
19 NYCRR Part 933: Gifts (Pursuant to Public Officers Law)
(ID No. JPE-33-12-00008-P)

On behalf of the Office of the State Comptroller (OSC), I offer these comments on the Revised Gifts Regulations published in the March 19, 2014 State Register by the Joint Commission on Public Ethics (JCOPE).

1) *Comporting with the language of the statute*

This agency previously submitted comments recommending against JCOPE's shift in approach regarding interpretation of Public Officers Law §73(5), away from a strict bar against accepting gifts from certain sources (denominated "Interested Sources") to creating the presumption of impermissibility to so accept. (See, memorandum dated September 30, 2013). In the Assessment of Public Comment submitted with this revised rule making, JCOPE indicated a preference for this approach, which "better comports with the language of the statute."

Public Officers Law §73(5) states, in part: "[n]o statewide elected official, state officer or employee, individual whose name has been submitted by the governor to the senate for confirmation to become a state officer or employee, member of the legislature or legislative employee shall, directly or indirectly: (a) solicit, accept or receive any gift having more than a nominal value, whether in the form of money, service, loan, travel, lodging, meals, refreshments, entertainment, discount, forbearance or promise, or in any other form, *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, in the performance of his official duties or was intended as a reward for any official action on his part . . . .* " (Emphasis added). Paragraphs (b) and (c) of §73(5) modify that circumstance clause to read ". . . unless under the circumstances it is not reasonable to infer that the gift was intended to influence him" and ". . . under circumstances where it is reasonable to infer that the gift was intended to influence him".

Applying these standards in the regulation, proposed Part 933.3(a) now states that receipt of a gift from an "Interested Source" is presumptively impermissible, unless three criteria are met: "(1) it is not reasonable to infer that the gift was intended to influence the Covered Person;

and (2) the Gift 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."

It is not clear how those criteria are to be analyzed and applied,[1] and I suggest that this uncertainty will not support public confidence in the integrity of the State executive and legislative branches' members and workforce. If the final regulations maintain the three-part test, I suggest that explanatory examples be added, including ones where the outcome is permissible. (See, New York State Department of Taxation and Finance regulations, which contain numerous examples interpreting statutory language; or the U.S. Office of Government Ethics website, interpreting 5 CFR Part 2635 Subpart B,[2] barring gifts to executive branch employees that come from certain interested sources).

A preferable, simpler approach to the three-prong analysis described above would be to maintain the bar against receipt of gifts from "disqualified" (now, "interested") sources, which has been in place for about twenty years. Other jurisdictions with this paradigm include the federal executive branch and the New York City Conflicts of Interest Board, for example. If it is suggested that the newly crafted text will not alter the resulting conclusion in terms of which gifts are permissible (when compared with standards set by Advisory Opinion), then the complexity of analysis that the new regulatory language seems to impose is without purpose.

2) Regarding new draft regulation text added in response to comments

- Multiple Gifts. The previous draft of Part 933.3(c) governing Multiple Gifts indicated that multiple gifts may be prohibited if given by a single person or entity within a twelve month period, as they might give rise to a Public Officers Law §74 violation.

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[1] Does the recipient determine, utilizing his/her view of the circumstances, whether the gift was intended to influence or reward him or her? If not the recipient, is a "reasonable person" supposed to be the standard against which the decision is made? In the event a gift case were to go to hearing, and a knowing and intentional violation of the regulation would need to be shown – how would the hearing officer or, ultimately, JCOPE ascertain whether it was reasonable to infer that the gift was intended to influence or reward official action. Would they determine – based on the status of the alleged violator - that the reasonable person standard would be State employees, or Legislators, as a group? Would the outcome of the analysis be different depending on whether an employee or an elected official were the recipient? If the reasonable person's view is to be the standard, should that reasonable person be one similarly situated to the recipient rather than a member of the public? This issue bears clarification.

[2] Subpart B prohibits employees from soliciting or accepting gifts from prohibited sources or gifts given because of their official position. The term "prohibited source" includes anyone seeking business with or official action by an employee's agency and anyone substantially affected by the performance of the employee's duties. For example, a company bidding for an agency contract or a person seeking an agency grant would be a prohibited source of gifts to employees of that agency. The term "gift" is defined to include nearly anything of market value.

The current proposal eliminates that language and instead states that "[n]othing 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 permissible Gifts."

By eliminating the notion of particular monetary value or a specified timeframe for reviewing receipt of gifts, the gift recipient is left without clarity as to what, if anything, is permissible. Eliminating the "bright lines" of a dollar value of a specified time frame will render enforcement of the applicable provisions under Public Officers Law §74 difficult.

- Notification, not approval. The previous draft of 933.4(a)(7)(ii), concerning "complimentary attendance at a widely attended event" required State officers or employees to secure approval to attend a Widely Attended Event from the State agency head or his/her designee.

The current proposal eliminates that approval requirement and instead substitutes a notification to the agency head or his/her designee of the officer or employee's intent to attend the event. Also, the current proposal eliminates the provision that the approval granted extends only to the individual seeking approval. It is unclear what the reasoning for this change might be, although the Regulatory Impact Statement stated the change was made "in response to comments received." It may be that few State agencies have resources dedicated to oversight of ethics matters for their officers and employees. However, enlisting an ethics officer's neutral review of an employee's request to accept complimentary attendance at a widely attended event would provide a layer of oversight with the laudable twin impacts of even-handed decision making plus the security of authorization for the employee.

- Regarding discounts for goods and services made to a select group of Covered Persons. Part 933.4(a)(11)(iii) describes factors to be considered when determining whether acceptance of discount is permissible, including consideration of the scope of the class covered; the amount and duration of the discount; whether the offer is based on factors other than official duties and responsibilities, and whether the offeror is an Interested Source.

Notably, the regulations do not indicate who makes the conclusion based on weighing the factors – is it the individual receiving the discount? A State agency head or his or her designee, or the Legislative Ethics Commission for Legislators and legislative employees? JCOPE?

To clarify this provision, I suggest a revision that requires the individual seeking to take advantage of the discount offered to a select group to seek approval from the State agency head or his/her designee, or from JCOPE or the Legislative Ethics Commission, as appropriate.

- Regarding Donors. Absent from this proposed regulation is any reference to the §73(5)(a) bar against donors directly or indirectly offering or making any gift of more than nominal value to a statewide elected official, any state officer or employee, member of the Legislature or legislative employee, under circumstances where the gift was intended to influence or reward official action.

Inasmuch as JCOPE has authority to refer to appropriate prosecutors the donors who make unlawful gifts to Covered Persons, it would seem appropriate to highlight the consequences for impermissible gift-giving.

3) Two technical suggestions.

Part 933.2(h), in the definition of "Educational Program" – change "who the program is presented to" to read "to whom the program is presented."

Part 933.3(c), regarding Multiple Gifts – addresses items, services, *or any other things of value*. However, 933.3 (a) and (b), regarding Gifts generally, speaks only in terms of items or services. I suggest the two provisions be consistent.

In conclusion, I urge JCOPE to take this opportunity to promote both the reality and perception of integrity in government by adopting final regulations that provide reasonable and clear guidance for public officials covered by the rules, and that bolster the public's faith in the just administration of those rules. It is hoped that the recommendations made in this memorandum will receive positive action.