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To: Joint Commission on Public Ethics

From: Barbara F. Smith, Special Counsel for Ethics

Subject: Comments on Revised JCOPE Regulations
19 NYCRR Part 934: Gifts (Pursuant to Legislative Law Article 1-A)
(ID No. JPE-33-13-00010-P)

On behalf of the Office of the State Comptroller (OSC), I offer these comments on the Revised Gifts Regulations (Pursuant to Legislative Law Article 1-A) published in the March 19, 2014 State Register by the Joint Commission on Public Ethics (JCOPE).

Aspects of the memorandum submitted on behalf of OSC and commenting on Part 933 Gifts (Pursuant to the Public Officers Law) are applicable to this proposed regulation as well.

Given the similar purposes of Parts 933 and 934, and the overlapping covered audiences, it would benefit those governed -- and the public -- if the definitions and substantive process were consistent.

- For example, *Bona Fide Political Event* is defined in Part 933.2 as “. . . a function the primary purpose of which is to support Political Organization(s) or Political Candidate(s)”; in Part 934.2 as “. . . a function the primary purpose of which is to provide financial support to Political Organization(s) or Political Candidate(s).” The definition of “Covered Person” [933.2] and “Public Official(s)” (recognizing the addition of municipal officers and employees in Part 934), could likewise benefit from a parallel definition.

Inasmuch as JCOPE has chosen to incorporate the provisions of Section 1-c(j) of Article 1-A of the Legislative Law (the definition of “gift”) into the Part 933 regulations governing Gifts (Pursuant to the Public Officers Law), perhaps it may choose similarly to select a single definition of “State officer or employee” from the Public Officers Law or the Legislative Law and have that single definition stand for both sets of regulations.¹

¹ Recognizing that municipal officers and employees would be an addition to the Part 934 regulations.

➤ *Regarding Draft Part 934.3 Gifts:*

Three rules are created:

- it is presumptively impermissible for a Lobbyist or Client to offer or give a gift to any Public Official [permissible only when three conditions are met];
- it is permissible for a Lobbyist or Client to offer or give a gift to the spouse or unemancipated child of a Public Official [unless one of three conditions is met]; and,
- it is permissible for a spouse or unemancipated child of a Lobbyist or a Client to offer or give a gift to a Public Official [unless one of three conditions is met].

These scenarios would benefit greatly from further explanation by way of examples.

➤ *Regarding Multiple Gifts.*

Part 933.3(c)	Part 934(f)
<p>“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 permissible Gifts under sections 933.3(a) or (b).”</p>	<p>“A Gift that is otherwise permissible under sections 934.3(a), (b) or (c) may be prohibited if it is one of multiple gifts from the same person, entity or organization offered². Such Gifts could create a reasonable basis for an inference that the Gift was intended to influence or reward the Public Official in connection with the performance of his or her official duties.”</p>

It appears that solicitation or receipt of multiple gifts under the Part 933 rule would create a potential Public Officers Law §74 violation for the recipient (but not a §73(5) violation, inasmuch as those individual gift instances were permissible under §73(5) analysis). A Covered Person may be able to accept a single gift from a donor, but several gifts from the same donor potentially would raise §74 problems; that seems fair.

However, given the similarity in the underlying statutory language and the subject matter of Part 934(f) and Part 933.3(c), a more closely parallel construction regarding the topic of multiple gifts would be beneficial to comprehension. Beyond this reader’s preference on that point, Part 934 then focuses on advising the particular subset of potential donors comprised of lobbyists and clients. Pursuant to Legislative Law §1-m “prohibition on gifts”, lobbyists and clients of lobbyists (and their spouses and unemancipated children) are barred from offering or giving a gift to any public official “unless under circumstances it is not reasonable to infer that the gift was intended to influence such public official”.³ The regulation drafters go on to

² Likely, the word “offered” should have been stricken when the phrase “within any twelve month period” was deleted from this draft of the regulations.

³ Note, no intention to reward official action is mentioned in the Legislative Law §1-m provision, which makes one consider whether gifts delivered after official action would have been

determine that multiple gifts could provide a reasonable basis for the inference that the gift was meant to “influence or reward” official action. By utilizing the passive voice, the regulation is ambiguous in its impact. If a Public Official receives multiple gifts from a lobbyist or client of a lobbyist, it appears, based on Part 934(f), that the recipient could conceivably be held liable for violating Public Officers Law §73(5), since those are the inferences described in the regulation; so too, might the donor be held responsible. However, should the drafters wish a parallel effect in the consequences for violations of Part 933 and Part 934 for recipients of multiple gifts, then revision of the text appears warranted. If the drafters intend to impose ‘only’ §74 potential violations/consequences for receipt of multiple gifts from those governed by Legislative Law §1-m, then the second sentence of (f) should be revised, possibly as

Receipt of such gifts could create a reasonable basis for the impression that the person, entity, or organization can improperly influence the Public Official or unduly enjoy the Public Official’s favor in the performance of official duties.

Without this or a similar change, it appears that receipt of multiple gifts from Interested Sources other than lobbyists would have less severe consequences than receipt of multiple gifts from lobbyists and their clients.

Last thoughts on multiple gifts. By eliminating the notion of particular monetary value or a specified timeframe for reviewing receipt of multiple gifts, both the donor and the gift recipient are left without clarity as to what is permissible. Eliminating the “bright lines” of a dollar value and a specified time frame will render enforcement of the applicable provisions difficult. Finally, the phrasing of Part 934(f) is not as clear as it might be – . . . a gift that is otherwise permissible may be prohibited *if it is one of multiple gifts* from the same person. . . Perhaps the drafters mean to say that the donation or receipt of the gift may be prohibited *if it is the second (or later number) in a series of multiple gifts* from the same donor?

➤ *Regarding Enforcement.*

The regulations would benefit from a clear statement regarding the consequences for violation, for both the donors and recipients.

permissible, absent the regulations expansion to bar gifts given with intent to influence or reward official action.