NEW YORK CITY BAR

COMMITTEE ON GOVERNMENT ETHICS

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NYS Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207

Re: Proposed Advisory Opinion: Restrictions on Elected Officials Soliciting/Accepting Campaign Support From Enforcement Subjects; Response to Submission by Office of the State Comptroller

Dear Commissioners:

I write on behalf of the Committee on Government Ethics of the New York City Bar Association.[1] Thank you for this opportunity to comment on the letter submitted by the Office of the State Comptroller ("OSC") on the above referenced Proposed Advisory Opinion ("PAO"), which addresses Section 74 of Public Officers Law of the State Ethics Code. We believe that the OSC's letter, which reflects its commitment to transparency, contributes much to the public consideration of this important topic.

We note at the outset the guiding principle underlying the PAO that interactions between an elected official, or members of his or her immediate staff or leadership team, and significant campaign contributors while those contributors have active matters before that elected official present the appearance of a conflict of interest, if not an outright conflict. Moreover, we also believe that members of the legislature should not be exempt from ethical practices put in place to guard against these dangers; while legislators, by their nature, interact regularly with significant contributors as part of the election process, doing so without appropriate safeguards – such as well-understood and accepted disclosure obligations – raises risks to government effectiveness.

The PAO addressed in the OSC's letter builds on guidance, issued by JCOPE's predecessor entity, that public officials in the Executive Branch of State Government, other than those elected to statewide office, may not, either during work hours or on their own time, solicit or accept campaign contributions from those with active matters before them or their offices.

[1] Please note that Committee member Robert Cohen took no part in the preparation of this letter or the Committee's consideration of its substance.

This PAO would overturn the current exemption for statewide elected officials, however, but only with respect to persons or entities that are either (1) subject to their enforcement power (including the Comptroller's audit power) or (2) are adverse parties in litigation.

In our November 16 letter commenting on this PAO, we urged that its scope be expanded to include legislative matters as well, so long as (1) the lobbying activity on the legislative matter directed at the elected official entails in person meetings or phone calls, and (2) the person or entity who is represented by the lobbyist directly soliciting the elected official has contributed more than a few thousand dollars in the aggregate in any year to that elected official or to a political entity from which that official gains political advantage.[2] We would suggest that, in practice, this extension of the PAO could be easily implemented by asking the elected official to provide a senior campaign staff member, on a confidential basis, with a list of parties to pending matters and from whom contributions must be returned or held apart to be returned when the investigation or other matter can be disclosed.

Relevant to our proposal, and to the Comptroller's comments, is the important difference between the existing advice concerning state officials who are not elected and the PAO's extension of coverage to elected officials. Under existing guidance, the contribution itself is not limited; the only limitation is on who may solicit or accept it. A person wishing to support the elected official may still contribute through the normal campaign channels. There is no substantial basis under the First Amendment to challenge the existing ethical guidance because its impact on the exercise of First Amendment rights is negligible.

Under the PAO, however, contribution itself is restricted and, thus, the application of the PAO to elected officials must meet First Amendment standards for limiting campaign contributions. *See Citizens United v. FEC*, 558 U.S. 310 (2010). These standards require that the restriction must reasonably be connected to the prevention of the appearance of a breach of public trust, which can arise when a campaign contribution appears to result in government action, or inaction, that benefits the contributor. In our prior comment we explained that this appearance test may be met if the circumstances of the contribution give rise to a reasonable supposition and plausible inference of such an exchange.

The principal basis for such a plausible inference is a significant campaign contribution. To address such a concern, the Rules of the Chief Administrative Judge presume that a "campaign contribution conflict" exists for a judge if the parties to a case before that judge have contributed more than $2,500 individually or $3,500 in the aggregate. 22 NYCRR 151.1. Similarly, we have proposed adding a triggering threshold to the PAO so that it applies only if a subject of, or party to, a matter pending before an elected official has contributed more than a few thousand dollars in the aggregate in any year to that elected official or a political entity in which he or she will benefit.[3]

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[2] *Available at* http://www2.nycbar.org/pdf/report/uploads/20072989-RestrictionsElectedsCampaignSupportfromEnforcementJCOPEAdvisoryGovtEthicsReportFINAL111615.pdf.

[3] We submit that, even if the Commission elects to confine the scope of the PAO solely to enforcement matters and adverse litigation rather than extending it, as we urge, to include legislative and other matters as well, a contribution amount trigger is still necessary to comply with the Constitution.

For legislative matters, we further proposed adding an additional threshold requirement that the elected official, or his or her staff, must also be the focus of paid lobbying by the campaign contributor through phone calls or in-person meetings. This requirement serves two purposes. First, for the reasons explained in our initial comment, such contact serves as an additional circumstance supporting the reasonable supposition and plausible inference of a breach of public trust warranting regulation. Second, this requirement also identifies with particularity those whose interest in a pending legislative matter rises to a level approaching a conflict of interest, such as that of a party to a proceeding or transaction before the office of a statewide elected official or a person or entity that is the subject of an investigation being conducted by the office of a statewide elected official.

With this background, we turn to the OSC's comments.

1. The OSC appears to read the PAO as covering any audit conducted by anyone in the Department of Audit and Control, including, for example, the audit of a state tax refund claim. We do not view the POA as that broad. Rather, we understand the PAO to cover matters in which statewide elected officials, either individually or through their immediate staff, participate personally and substantially. Cf. New York Rules of Professional Conduct for Lawyers 3.11, Special Conflict Rules for Present and Former Government Officers and Employees. Such personal and substantial participation would not happen in an audit of a state tax refund claim unless the Comptroller or his staff undertook to decide, instruct or directly influence the decision of the matter. Similarly, we do not believe that the PAO should apply to all executive agencies simply because a significant contributor directs campaign contributions to the Governor. It would be overbroad to attribute all matters pending before all executive agencies to the Governor for the purpose of delineating his or her ethical responsibilities; hence, the necessity for direct and personal involvement in a matter by the Governor, or his or her staff.

2. The OSC questions the application of the contribution bar to the campaign staff of the elected official. The OSC's comment rightly focuses on the meaning of the word "know" in the proposed advice, which addresses contributions through the campaign staff that the elected official "knows" about. Because ethics principles govern the appearance, as well as the actuality, of conflicts of interest, we submit that actual knowledge by the elected official is not required. Rather the appearance test is met if there is a basis for a reasonable supposition and plausible inference that the elected official knew of the contribution. We believe, however, that it is a reasonable supposition that the elected official knows the identity of everyone who has made a significant contribution to his or her campaign. Accordingly, we suggest that, in order to implement the PAO, the elected official inform a trusted senior campaign staff member on a weekly basis of the identity of parties to active matters in which the elected official or his or her immediate state staff are personally and substantially involved. It would then be the responsibility of that staff member to intercept or return any contribution made by a person or entity on this list, or to set the

contribution aside to be returned when it becomes appropriate to disclose the subjects of investigation or contemplated litigation.

3. The OSC expresses concern over the PAO because, it notes, the Comptroller would not be in a position to identify relatives of a person who is the subject of an audit or investigation or a party to adverse litigation, as well as officers, directors and 10 percent or more shareholders of an entity that is such a subject. The OSC also wonders whether the PAO is intended to cover affiliates and subsidiaries of an entity that is the subject of an audit or investigation.

   Our view is that an officer, director or employee or representative who is individually an audit or investigative subject, or a party to a litigation or transaction, would be covered under the PAO, but that a relative, officer, director, employee or representative of a company would not be barred from making a contribution to the elected official simply because that company is the subject of an investigation or audit or has any other matter pending before the elected official to whom the contribution is made. Contributions to elected officials by a person or entity that has a significant financial stake as an owner or as a 10 percent or more shareholder in a corporation (including its parent), however, and that is a subject or party to a pending mater should be counted when determining whether the contribution amount trigger has been met. That financial stake supports the reasonable supposition and plausible inference of the contribution may have been given to induce favorable action. Likewise, contributions by a spouse should be counted as well, given that a marriage can be affected financially by any decision. We do not believe it is unreasonably burdensome to ask the staff of the elected official to make reasonable efforts to ascertain this identifying information.

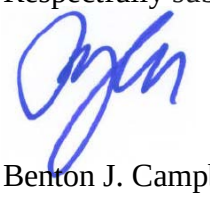
4. The OSC urges that it is anomalous that candidates for elected office are not covered, in contrast to office holders. We believe this is an appropriate limit on the PAO because a candidate is not in a position to violate the State Code of Ethics either by conduct appearing to be in conflict with his or her official duty or by conduct which gives rise to a reasonable suspicion of a breach of public trust. *See* Public Officers Law, section 74 (f) and (h). If, for principles of fairness, the Legislature believes that candidates should be subject to equivalent restrictions, the existing contribution limits for candidates could be lowered as a reasonable alternative.

5. The OSC asks about tracking mechanisms and whether additional contribution disclosures will be required. We believe the elected official and his or her campaign staff can request from their own campaign contribution records, or from the existing data base maintained by the Board of Elections, the contribution information needed to implement the limitations on soliciting or accepting contributions from subjects of investigation. We would suggest not extending the POA to contributions received before a matter comes before the elected official unless it was foreseeable to the elected official that the matter would likely arise and that he or she or his or her immediate staff would be personally and substantially involved. This approach

provides a practical basis for the elected official and his or her campaign staff to know when to refuse or return contributions.

In conclusion, thank you again for the opportunity to submit these Comments. We also note that the OSC has suggested holding a forum or roundtable.[4] If the Commissioners would find that useful, we would be happy to participate.

Respectfully submitted,



Benton J. Campbell

Cc: Hon. Thomas P. DiNapoli, State Comptroller
Nancy G. Groenwegen, Counsel to the Comptroller

[4] As we noted, we are grateful and appreciative of the OSC's decision to publicly release its letter seeking public comments on the proposed PAO. We remain concerned, however, by the report in the *Albany Times Union* that the offices of Governor Andrew Cuomo and Attorney General Eric Schneiderman made oral comments to your counsel which have not been publicly disclosed. *See* Chris Bragg, "Statewide officials seek to narrow draft opinion curbing own fundraising", Albany Times Union, Nov. 17, 2015 *available at* http://www.timesunion.com/local/article/Statewide-officials-seek-to-narrow-draft-opinion-6639520.php. So that the public discourse on this important topic can be as complete and robust as possible, as well as to complete the record regarding comments on the proposed PAO, we urge that JCOPE provide a summary of those oral comments, coupled with an opportunity for public comment on that summary.