DRAFT OF JANUARY 21, 2024

STAFF PROPOSAL FOR CARRYING OUT THE REQUIREMENTS OF EXECUTIVE LAW §94(1)(d)

Executive Law §94(1)(d) calls for a "comprehensive review" of the regulations that were in effect when ECRA became operative, as well as a "review" of the advisory opinions of "predecessor ethics agencies, including" JCOPE, COPI, SEC and the temporary lobbying commission, and of the LEC. The review should address the consistency of the regulations and advisory opinions among each other and with the new language of ECRA as well as the effectiveness of the existing laws, regulations, guidance, and ethics enforcement structure.

Formal governmental ethics legislation in New York dates at least to 1907, with the enactment of what is now Section 6 of the Executive Law, empowering the Governor to appoint so-called "Moreland Act Commissions" "to examine and investigate the management and affairs of any department, board, bureau or commission of the state." The Code of Ethics for state officers (including all executive branch officials and employees and employees of the legislature, but not legislators), now codified at Public Officers Law §74, was enacted in 1954; and a comprehensive schema for ethics regulation, including the creation of the State Ethics Commission, the Legislative Ethics Commission and the Temporary Commission on Local Government Ethics emerged from the work of the Commission on Governmental Integrity, the so-called "Feerick Commission," with the enactment of the Ethics in Government Act (L.1987, ch. 813) and the Governmental Accountability, Audit and Internal Control Act of 1987 (L.1987, ch. 814).

New York's first lobbying statute was enacted in 1906 (L. 1906, ch. 321), requiring registration of lobbyists and the reporting of their expenses to the Secretary of State; 71 years later, the legislature enacted the Regulation of Lobbying Act (L.1977 ch.937), *inter alia* creating the Temporary State Commission on Lobbying. In 2007, PEERA - the Public Employees Ethics Reform Act (L.2007, ch.14), placed the regulation of executive branch ethics and state and local lobbying activity under the jurisdiction of one agency, the Commission on Public Integrity.

In 2011, PIRA – the Public Integrity Reform Act of 2011 (L.2011, ch.399) added a degree of authority over the legislature and its employees to the jurisdiction of a new ethics and lobbying agency, the Joint Commission on Public Ethics ("JCOPE"). ECRA followed, in 2022. (A more fulsome summary of the history of ethics and lobbying regulation in New York State, through 2019, can be found at pages 1 through 11 and 119 through 122 of JCOPE's "Ethics and Lobbying in New York: A Comprehensive Guide" (the "Blue Book"), available on the Commission's website at https://ethics.ny.gov/2019-ethics-and-lobbying-new-york-state-comprehensive-guide.)

ECRA is not the first statute to call for a review of the laws, regulations, and advisory opinions administered by the state's ethics and lobbying commission. PEERA, at former Executive Law § 94(1) (L. 2007, ch. 14, § 2), called for the Commission on Public Integrity to undertake a review the consistency of prior regulations and advisory opinions with the new statutory language, but not of their effectiveness, and to report its findings to the governor and legislature to and propose any regulatory changes and issue any advisory opinions "necessitated by such review" before April 1st of the following year. PIRA contained a directive to JCOPE, also at former Executive Law Section 94(1), nearly, but not completely, identical to ECRA's to COELIG; it differed from ECRA's corresponding provision in that it required the review to be conducted with the LEC; the effectiveness assessment was focused on the "ethics of covered public officials and related parties"; and it gave JCOPE a little more than three years to complete the exercise and to report its conclusions and recommendations to the governor and legislature. PIRA also called for the formation of an independent Ethics Review Commission to assess the performance of both JCOPE and the LEC and to report its findings and recommendations to the governor and legislature after both bodies had operated under the new statute for approximately four years. The resulting reports are useful not only as historical artifacts but also for their insights into the practical and prudential challenges ethics compliance and enforcement bodies face. Copies of both reports are attached (minus the Review Commission Report's appendices, which are voluminous, and will be provided separately on request). The City Bar Association and New York Common Cause published an assessment of their own, in 2014, "Hope for JCOPE"; a copy of that is attached as well.

Work to date. Over the past year, staff has put forward, and the Commission, with notice to the public and after considering comments received in accordance with the State Administrative Procedure Act, has amended the Commission's regulations, at Title 19 NYCRR, Chapter XX, to conform to the new language of ECRA, including Parts 930-938 and 941-943. (19 NYCRR Part 940, governing the permissible and proper usage of public service announcements with public officials was not amended as ECRA did not confer on the Commission jurisdiction over, or the authority to adopt rules or regulations governing, public service announcements).

In addition, staff has identified those advisory opinions that have been obviated by the subsequent adoption of regulations by the Commission's predecessors and, more recently, by the conforming amendment of those regulations by the Commission. Staff has also identified a number of advisory opinions that, in staff's view, should be withdrawn, modified, or revisited by the Commission in light of subsequent legislative changes, judicial decisions, or advisory opinions.

With respect to the effectiveness of the *existing* laws (presumably excluding ECRA, as ECRA appears to be the benchmark against which the existing regulations and advisory opinions are to be measured for consistency), regulations, guidance, and ethics enforcement structure, the statute neither defines nor establishes metrics for gauging the effectiveness of the four categories of things that are the subject of the reviews called for by the statute. We do know that Ethics laws have at least two, dependent, objectives: one

is to require public officers and employees to comport themselves and to act in the public interest, and not corruptly, and to disincentivize non-compliant conduct; the other is to give the public reason to believe that the first requirement is being observed and that departures are detected and punished. Even if it were possible to have one without the other, neither alone would be sufficient.

COELIG. COELIG is first and foremost, but not exclusively, a compliance agency, with operations that fall into five functional categories: public official and full workforce conflict of interest and post-employment regulation; ethics training and continuing education; state public official and upper-tier workforce financial disclosure; lobbying and lobbying activity disclosure and regulation; ethics and lobbying regulation-related information dissemination to the public and the regulated communities. These areas of commission oversight and activity reflect the statutory division of responsibility within the agency and necessarily will inform the contours of the statutory and regulatory review.

In this context, the following is offered as a complementary modification to the proposed review committee action plan. That is, it includes substantially the same functional divisions as the proposed action plan, with some components sweeping more broadly and others more narrowly targeted, and follows a similar, albeit not identical, arc of activity.

Proposed Phase 1a – Ethics and conflict of interest regulation. With respect to its ethics and conflict of interest regulatory and guidance functions, COELIG does not act alone. New York's existing guidance and ethics compliance and enforcement structure is a distributed network consisting, in the first instance, of COELIG, the Legislative Ethics Commission, and over 200 ethics officers and training compliance officers who directly serve the more than 380 state executive branch agencies, commissions, and authorities whose officers and employees are subject to the requirements of Sections 73, 73-a and/or 74 of the Public Officers Law and Section 107 of the Civil Service Law. Agency ethics officers serve on the front line of workforce compliance, and they not only have the most immediate knowledge of and contact with workplace ethics compliance issues and departures, they have unique insight into the challenges workers and supervisors face and the sufficiency, or not, of the tools that are available – and those that should be but perhaps aren't – to address those issues. These ethics officers and their adjuncts are key to any assessment of the effectiveness of the ethics laws and structure.

Companion to the primary network of state ethics officers is a parallel network of investigative and enforcement entities, both within the regulated bodies and independent of them, including the New York State Office of the Inspector General; the Metropolitan Transportation Authority Office of Inspector General; the Department of Corrections and Community Services Office of Special Investigations; the Port Authority of New York and New Jersey Office of Inspector General; the Medicaid Office of Inspector General; the Attorney General's Public Integrity Bureau; the Office of the State Comptroller and the various internal affairs, human resources, and general counsel offices that reside

within a panoply of executive branch agencies. In addition, New York's 62 county district attorneys' and four United States attorneys' offices are important adjuncts to that network, responsible not only for investigating, receiving referrals concerning and prosecuting criminal violations of the ethics and lobbying laws and related statutes, but also for referring and providing important evidence and other information concerning potential civil violations of those laws.

Proposed Phase 1a - Qualitative and Quantitative Data Collection: Determining the Scope and Pervasiveness of Challenges in the Field.

Ethics:
As a first step, there should be a targeted qualitative survey of agency ethics and training compliance officers and of the adjunct investigative officers and units to determine the full scope of challenges faced in the field. The survey should be designed to identify the challenges that the responding individuals and the bodies they represent have in implementing the requirements of the state's ethics laws, including whether the requirements are heeded by the leadership and workforces in their respective agencies and the agencies over which they have jurisdiction; their perceptions of the weaknesses, if any, in the current ethics statutes and regulations; and the extent to which they believe we are providing them and those they oversee with the support, training, assistance and tools needed to foster respect for and compliance with the requirements of the state's ethics laws and regulations. After being asked to identify the challenges, they should also be asked to provide recommendations both to address deficiencies they've identified in the laws, regulations and structure and to improve those functions that they consider to be working well.

Ideally, the survey process should be complemented by a series of workshops or focus groups, during and immediately following the survey, to ensure candor, best thinking and clarity in and from the responses that are provided. (To that end, we will need to determine whether there should and can be a confidential component to the survey process.)

Once the full scope and array of challenges are known, we should disseminate a broad quantitative survey to determine how pervasive the challenges identified in the qualitative survey are in the field. We could also ask surveyors to rate whether the proposed recommendations identified in the qualitative survey would adequately address the challenges.

[Query whether there should be a parallel simultaneous survey conducted of stakeholders – including public employee unions and associations, elected officials, "watchdog" and other private-interest groups, and bar association ethics and state and local government committees – or whether the input we have received from our annual public hearings and roundtable will suffice for the purposes of this component of the Section 94(1)(d) process. We should also consider whether it would be useful to use our ethics training sessions to glean specifically targeted pertinent information firsthand from those whose

conduct is directly affected by the ethics laws and regulations, whether by more detailed than usual post-session survey or by gauging reactions, e.g., through polling, during the training sessions, or both].

Lobbying:
In very broad terms – the precise statutory definition is set out in Legislative Law §1-c(c) – "lobbying" is the attempt to influence government action. The survey of state agency ethics and training compliance officers and of the adjunct investigative officers and units should include a section designed to elicit information concerning lobbying activities targeting individuals within the functional scope or jurisdiction of the survey respondents. However, because, in contrast to the other components of our agency's book of business, the community directly regulated by the Lobbying Act and our lobbying regulations is largely private, and except to the extent that community is subject to overlapping local regulation – most notably, the New York City Clerk's Office's Lobbying Bureau, but also other municipal bodies – it is regulated primarily by our commission, we should survey relevant trade groups (e.g., ESSAE), bar association committees, lobbying firms, law firm lobbying practice groups, and similar organizations and consider surveying a sample selection of lobbyists and lobbying clients. We can also include so-called "watchdog" groups, although as a result of both our public hearing and more recent roundtable outreach, as well as the general stream of communications from the principal Albany groups, we have a fairly granular understanding of where they believe the lobbying laws and regulations could stand improvement.

The same process should be used to identify the scope of challenges in the field and to solicit proposed recommendations through a qualitative survey, with focus groups, followed by a qualitative survey to determine the pervasive of the challenges and adequacy of the recommendations.

Phase 1b – Refresher on Current Laws and Regulations.

While the surveys are being conducted, a reprise of the in-depth orientation sessions staff provided to Commissioners as part of the onboarding process would no doubt be useful for this phase, and perhaps substantially more informative now that Commissioners have had a good deal of practical exposure to the work of the Commission and the challenges the Commission faces in achieving its mission. A working familiarity with the Blue Book would be useful as well.

Phase 1c –COELIG Staff and Commissioner input.

A no less probing inquiry should be made of COELIG staff and Commissioners. In many respects, this ground has been covered in the recent public hearing follow-up process and

in the development of the agency's legislative agenda. Nonetheless, because much of that has been at the policy and macro level, there should be an opportunity for staff and Commissioners to weigh in with their insights and concerns.

Phase 1d - Advisory Panel or Consultant

Proper assessment of the results will be as important as the results themselves. To ensure we have the necessary expertise and objectivity applied to interpreting the results, we should consider convening an advisory panel or seeking input from an independent consultant to oversee the primary assessment of the results following staff review so they are aware of all considerations.

Phase 2 – Diagnostics. The survey results should inform the second phase of the Executive Law §94(1)(d) review, developing the contours, and defining more precisely the objectives of the review, which should be focused on categorizing, and then weighing, the perceived strengths and challenges of New York's statutory and regulatory framework for achieving compliance with the state's governmental ethics and lobbying laws, component-by-component.

Phase 3 – Remedial Assessments. The specifics of this part of the review process necessarily will depend on what emerges from Phase 2. The range could be from identifying, or developing, means to further strengthen what is working well (or leaving it as is) and fixing what isn't, to evaluating potentially dramatic modifications in the way the agency does its work and in the tools that are available to it. This phase should include, as appropriate, looking to the experience of other jurisdictions, and their corresponding laws, regulations and interpretive opinions, in addressing issues parallel to those identified in our review process. It should also include consideration of technologies that are available and in use in other jurisdictions that could improve our agency's efficiency and effectiveness. And although sufficiency of agency funding is not a stated element of the Executive Law §94(1)(d) review, budgetary considerations and strategies may be instrumental in the devising of potential remedies.

Phase 4 – Integrating Recommendations, Public Hearing and Comment and the Legislative Agenda.

Once the Commission identifies the recommended changes as a result of the process, it should publish them for public comment, which could be incorporated with the Commission's annual public hearing, providing the public, the field, and stakeholders the opportunity to comment on the proposals in writing or orally. Any draft regulations that are ready could be out for public comment at the same time to streamline the public comment process.

Those recommendations needing legislation would form the basis of the Commission's legislative agenda for that year, thus integrating this process with the process to develop the legislative agenda to more efficiently effectuate change and be mindful of to maximize Commissioners and staff's time and efforts. Given the ample opportunity to hear from the field, stakeholders and the public, we can determine after the public hearing if a roundtable is needed, which it may well not be.

Phase 5 – Implementation.

The Commission currently has a collection of proposed amendments to its operative statutes that it may wish to pursue in the upcoming legislative session, as well as a reserve body of changes that it may decide to advance in the future. Others, as well as possible further amendments to its regulations pursuant to SAPA, may arise from the review process, as may the need for additional budgetary support. Conversely, there may be changes proposed that can be implemented by the Commission without added statutory authority or regulatory amendments. We should be flexible in our expectations even as we are steadfast in our commitment to achieving our mission.

Attachments:

New York State Joint Commission on Public Ethics, *Third Year Report* (2015)

New York Ethics Review Commission, *Review of the Joint Commission on Public Ethics and the Legislative Ethics Commission: Report and Recommendations* (2015)

Association of the Bar for the City of New York and Common Cause/New York, *Hope for JCOPE* (2014)