

To: Liz Fine and Jeff Pearlman, Executive Chamber, Governor Hochul
Shontell Smith and Eric Katz, Senate Leader Andrea Stewart-Cousins's Office
Rebecca Mudie and Brian Haak, Assembly Speaker Carl Heastie's Office

From: Citizens Union, Committee to Reform the State Constitution, Common Cause/NY, League of Women Voters of New York State, New York City Bar Association-Committee on Government Ethics and State Affairs, New York Public Interest Research Group, Reinvent Albany, Sexual Harassment Working Group

Subject: Appointment process for ethics commission that respects concerns of the Governor and Legislature

Date: March 17, 2022

We urge our elected leaders to create a new, independent New York State ethics commission in this year's budget.

We have read the one-house budget bills and we implore you not to pass a budget that keeps the Joint Commission on Public Ethics in place. JCOPE is a public embarrassment to you and the people of this great state. JCOPE must be replaced by a new agency and new agencies are best created and funded in the budget.

Our groups have spoken with members and the central staff of both houses and understand the Legislature does not like the Governor's proposal to use law school deans to select an independent ethics commission. Our goal, and we hope yours, is for New York to select ethics commissioners in a way that preserves their independence and ability to act without fear or favor. Fortunately, there are ways of doing this and respecting both the Governor's goal of not having elected officials directly appoint commissioners and the Legislature's concerns about the commission's accountability.

We ask you to create in the budget a new *ethics commission* which has five commissioners selected by a seven-person *selection committee* appointed by the four majority and minority leaders of the legislature and the three statewide elected officials.

Below, we also detail transparency measures that are integral to the independence of the commission and that ensure the selection process is as open, fair and transparent as possible. Further, we urge you to provide the new and improved ethics commission with \$10 million in annual funding to allow it to better perform its oversight duties, an increase over the \$5.6 million currently provided to JCOPE.

Proposed Selection Process for Independent Ethics Commissioners

Elected Leaders Appoint A Seven-Member Selection Committee

Legislation should establish a seven-member *selection committee* with each of the following appointing one member to the committee:

- Governor
- State Comptroller
- Attorney General
- Senate Majority Leader
- Senate Minority Leader
- Assembly Speaker
- Assembly Minority Leader

The Selection Committee should follow a transparent process to appoint a five-member *ethics commission*. The five-member commission is per the Governor's proposal in Part Z of the PPGG Article VII bill, and crucially should be amended to include the key transparency measures we suggested to you in February:

1. Creating a Transparent Selection Process

- a. More detailed criteria regarding experience, expertise, qualifications, and requirements for diversity of the *ethics commission* should be provided in the statute.
- b. The Governor's proposal gives the *selection committee* the responsibility to develop procedures for soliciting and reviewing applications from members of the public to serve as commissioners. This could instead be specified in the statute, or if left to the selection committee, procedures should be issued as proposed rules subject to public review and comment under the State Administrative Procedures Act before they are finalized. The procedures should address:
 - i. how members of the public can submit an application to serve on the *ethics commission*;
 - ii. application of statutory criteria for selection of commissioners, including but not limited to considering diversity, qualifications and expertise of applicants; and
 - iii. the voting process used by the *selection committee*, including the use of ranked choice voting.
- c. A final list of candidates for the *ethics commission* should be published 15 days in advance of a public vote of the *selection committee* to confirm the appointees, and public comment should be accepted on the candidates. This is the current timeframe used by the Judicial Nominations Commission.

- d. The *selection committee* should publish a report after the conclusion of the selection process that includes detailed information about the vetting process used, including:
 - i. the methods used to publicize and receive applications;
 - ii. the number of applications received;
 - iii. the number of applications rejected because the applicant did not meet the statutory criteria;
 - iv. the number of applications rejected as incomplete;
 - v. the number of applicants interviewed by selection committee; and
 - vi. an aggregate breakdown of the diversity of the applicant pool, including gender, occupational, geographic, and racial and ethnic diversity.

2. Increasing Independence and Effectiveness

- a. There should be express prohibitions on communications between the *selection committee* and any state elected official during the selection process other than what would be publicly reported as lobbying communications.
- b. Prohibitions should bar both *selection committee* and *ethics commission* members from serving if they or their spouses, domestic partners and unemancipated children have for the last three years been (with regard to New York):
 - i. lobbyists;
 - ii. state vendors or contractors;
 - iii. major campaign contributors (those contributing \$15,000 or more in the aggregate in any year);
 - iv. party officials;
 - v. state and local elected officials; and
 - vi. state and legislative officers and employees.
- c. The Governor's proposal that commissioners cannot make campaign contributions to candidates in New York should be expanded to state and local party committees.
- d. The Executive Director should be subject to the same prohibitions as commissioners.
- e. The power to remove commissioners and the Executive Director should rest with the commission, as proposed by the Governor.
- f. The ethics commission should have the power to directly discipline executive branch officials and employees, and recommend discipline of legislative branch officials and employees (we believe the Constitution should be amended to allow an independent, joint commission to discipline both branches of government).

- g. It should be clear that the Commission can delegate to the Executive Director the ability to issue subpoenas for documents and depositions without a commission vote in particular matters or classes of matters.

Beyond the appointment process for the commission, our [February letter](#) also provided recommendations that should be addressed in any final ethics commission proposal:

3. Transparency of Ethics Commission Operations

- a. The commission must be subject to Freedom of Information Law requests, Open Meetings Law and the State Administrative Procedures Act.
- b. *Ex parte* communications should be banned except where the communication is with a target of, or witness in, an investigation.
- c. Breaches of confidentiality should be able to be referred to the Attorney General, not just Inspector General (in Governor's proposal and must be retained by the Legislature).
- d. After a finding of probable cause/a substantial basis finding, any subsequent hearings should be public.
- e. Commission votes should not be confidential.
- f. Substantial basis reports should be released quickly. The current time is 45 days after delivery to the respondent, and the Governor's proposal is 20 days for state officials and employees. A new, reduced period should be the same for both state officers and employees and legislators and legislative staff. Substantial basis reports regarding harassment and discrimination complaints should not include complainants' identifiable information (note that this is current practice by JCOPE).
- g. The commission should hold an annual public hearing to solicit recommendations to improve the ethics laws and operations of the commission (in Governor's proposal and should be retained by the Legislature).

4. Expanding the State Ethics Code - The Ethics Code should be substantially improved by:

- a. Including a duty to report known misconduct, a duty to respect the dignity of all persons, and a duty to not engage in sexual or other discriminatory harassment, specifically linking the code with the NYS Human Rights Law. Initial adjudication of discrimination related claims could be by the Division of Human Rights with the commission as the final arbiter of the appropriate discipline.
- b. Adding penalties for additional sections of the State's Code of Ethics. Some sections are currently without penalties attached.

5. Improved Disclosure Reports - Lobbying and financial disclosures reviewed by the ethics commission should be improved to increase transparency and the ability of the commission and public to vet these disclosures for accuracy and conflicts of interest:

- a. Require lobbyists to specify whether lobbying is in support or opposition (or support or opposition with modification) to legislation or other governmental action.
- b. Lobbyists should report political contributions and fundraising activity, as done in NYC (this should be accompanied by expanded reporting of employers in campaign finance disclosures).
- c. Political parties should be made explicitly subject to the Lobbying Law.
- d. Financial disclosure filers should be expanded to include economic development entities.
- e. Financial disclosures should be required to be made electronically, with full public disclosures in machine-readable format on the commission's website.
- f. Financial disclosure forms should be streamlined to have only one table of monetary ranges and require more specificity in reporting, including information about filers' domestic partners (the Governor's proposal only added domestic partners).