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Proposal for a New State Ethics Commission in New York

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Proposal for a New State Ethics Commission in New York: What Comes Next?

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Why push for a new ethics watchdog?

With the start of the 2019 legislative session, some New York lawmakers are setting their sights on overhauling the state's current anti-corruption and ethics structure. Since 2000, 30 New York lawmakers have left state office facing criminal or ethical allegations¹ and many more public employees have faced allegations of criminal or unethical conduct² and termination of their employment. Leading the effort to overhaul the current system is Senator Liz Krueger, a Democrat from Manhattan, who recently announced her plan to introduce a constitutional amendment that would create a new independent ethics commission to investigate wrongdoing by public officials.³ The Center for the Advancement of Public Integrity agrees with this effort and has signed on in support of this legislation.

Currently, there are two ethics panel in New York State that are tasked with investigating the conduct of public officials: The Joint Commission on Public Ethics, or JCOPE, and the Legislative Ethics Commission, or LEC. JCOPE was created in 2011, during Governor Cuomo's first term in office and its purpose was to be an independent, non-partisan anti-corruption watchdog.⁴ LEC was created in 2007 pursuant to the Public Employees Ethics Reform Act of 2007.⁵

What is the current system? What are JCOPE and LEC?

JCOPE is comprised of fourteen commissioners. Six commissioners are appointed by the Governor and the Lieutenant Governor,⁶ three are appointed by the Temporary President of the Senate, three are appointed by the Speaker of the Assembly, one is appointed by the Minority Leader of the Senate, and one is appointed by the Minority Leader of the Assembly.⁷ The JCOPE chairperson is appointed by the Governor. The commission is tasked with supervising and regulating lobbying activities in New York State as well investigating any violations of the New York Lobbying Act, state ethics laws, and the Little Hatch Act.⁸ JCOPE has broad authority to investigate the conduct of statewide elected officials and legislators and candidates for those offices, state employees and employees of the legislative branch as well as some party officials and registered lobbyists and their clients.⁹ If JCOPE finds that a violation has occurred and the violator is not a member of the legislature, a candidate for such office or a legislative employee, JCOPE has the authority to impose a civil penalty on such individual or refer such violation to a prosecutor's office. In situations where the violator is a member of the legislature, a



¹ David Klepper, *Lawmakers unveil new anti-corruption measures*, AP News (Jan. 8, 2019), <https://www.apnews.com/9d668cbebfad4cccba898abe118ab82c>

² A recent example is Angel Barbosa who was fired in 2017 from his position as the MTA's chief procurement officer. Barbosa is accused of engaging in various bribery schemes. See Danielle Furfaro et al., *MTA financial exec fired for allegedly bribing accounting giant*, NY Post (Mar. 20, 2017), <https://nypost.com/2017/03/20/mta-financial-exec-fired-for-allegedly-bribing-accounting-giant/>

³ David Klepper, *Lawmakers unveil new anti-corruption measures*, AP News (Jan. 8, 2019), <https://www.apnews.com/9d668cbebfad4cccba898abe118ab82c>

⁴ Karen Dewitt, *Advocates: Inequities in NY Ethics Panel One More Reason To Scrap It*, WAMC Northeast Public Radio (Dec. 7, 2018), <https://www.wamc.org/post/advocates-inequities-ny-ethics-panel-one-more-reason-scrap-it>

⁵ *About the Legislative Ethics Commission*, NYS Legislative Ethics Commission, <https://legethics.ny.gov/site-page/about-legislative-ethics-commission> (last visited Jan. 10, 2019)

⁶ N.Y. Exec. Law § 94 (McKinney, Westlaw through L.2018, chapters 1 to 522)

⁷ *Id.*

⁸ *Jurisdiction and Authority*, New York State Joint Commission on Public Ethics, <https://jcope.ny.gov/jurisdiction-and-authority> (last visited Jan. 10, 2019)

⁹ *Id.*

candidate for such office or a legislative employee, JCOPE has the authority to refer the investigation to LEC, which in turn has the authority to sanction such violation.¹⁰

Despite its broad authority, JCOPE has come under fire for being ineffective, both in terms of preventing abuse of office and in terms of investigating and punishing such abuse once it occurs.¹¹ JCOPE's inaction in the case of Joseph Percoco,¹² a former top aide to Gov Cuomo who has been convicted on federal corruption charges, is one such recent example that critics point to. JCOPE's opponents often point to three main failings in JCOPE's composition: 1) JCOPE's lack of statutory authority to sanction legislators, legislative employees and candidates running for legislative office, 2) the ability of a minority of its members to block investigations,¹³ and 3) the broad authority of appointing bodies to remove its appointees.¹⁴ Such failings, opponents argue, have created a commission that cannot be an effective anti-corruption watchdog.

JCOPE's legislative branch equivalent, LEC, is comprised of nine members.¹⁵ The Temporary President of the Senate, the Speaker of the Assembly, the Minority Leader of the Senate and the Minority Leader of the Assembly each appoints one legislative and one non-legislative member.¹⁶ The final member of the commission, another non-legislative appointee, is jointly appointed by the Speaker of the Assembly and the Majority Leader of the Senate.¹⁷ LEC's mandate is the enforcement of the state's ethical and anti-corruption laws as they apply to legislators and former legislators, individuals running for legislative office and individuals who have run for office, and legislative employees and former legislative employees.¹⁸ Similar to JCOPE, LEC members may impose civil penalties or refer the violation to prosecutors.

What is the proposed commission?

The proposed amendment seeks to eliminate the dual commission model now employed and create one single ethics watchdog which will redress the perceived weakness of JCOPE and LEC by: 1) having a broader enforcement mandate, 2) having a larger array of sanctions, 3) overhauling the appointment process and decreasing the influence that the appointing authority has over its appointee and 4) ensuring funding for the commission.

The amendment seeks to create a broader legal enforcement mandate for the new commission than the one enjoyed by JCOPE and LEC combined, in part by explicitly giving it jurisdiction to pursue sexual harassment violations. More specifically, the commission would be tasked with enforcement of the state ethics laws,¹⁹ laws providing for disclosure of financial and other interests²⁰ by state officers and employees, laws regulating lobbying activity and lobbyists, laws related to government procurement, and laws relating to workplace behavior.²¹ The individuals who would fall within the commission's

¹⁰ N.Y. Exec. Law § 94 (McKinney, Westlaw through L.2018, chapters 1 to 522)

¹¹ Karen Dewitt, *Advocates: Inequities in NY Ethics Panel One More Reason To Scrap It*, WAMC Northeast Public Radio (Dec. 7, 2018), <https://www.wamc.org/post/advocates-inequities-ny-ethics-panel-one-more-reason-scrap-it>

¹² Zephyr Teachout, *JCOPE, responsible for protecting ethics, provides cover for Albany insider instead*, Lohud (June 11, 2018), <https://www.lohud.com/story/opinion/contributors/2018/06/11/jcope-ethics-zephyr-teachout/689294002/>

¹³ 8 or more commissioners must vote to authorize an investigation to go forward. However, if the investigation pertains to a member of the legislature, legislative employee, or a candidate for member of the legislature, at least 2 of the commissioners voting to initiate an investigation must have been appointed by a legislative leader or leaders from the major political party in which the person under investigation is enrolled. Similarly, if an investigation pertains to state officer or employee, at least 2 of the commissioners voting to initiate an investigation must be appointed by the governor or lieutenant governor. Finally, there is no ban on ex-parte communication between commission members and their appointing authority, so commission members can block investigations at the behest of their appointing authority. N.Y. Exec. Law § 94 (McKinney, Westlaw through L.2018, chapters 1 to 522)

¹⁴ The appointing authority may remove a commissioner for substantial neglect of duty, gross misconduct in office, violations of certain confidentiality provisions, and "inability to discharge the powers or duties of office". N.Y. Exec. Law § 94 (McKinney, Westlaw through L.2018, chapters 1 to 522). The statute that establishes the commission does not delineate any standards by which to define the conditions above, and the last condition is so broad that an appointing authority may easily create an ex-post justification to remove an appointee that has taken an unwanted action.

¹⁵ N.Y. Legis. Law § 80 (McKinney, Westlaw through L.2018, chapters 1 to 522)

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ N.Y. S 594, §2. The commission is also tasked with periodically reviewing the state ethics code and proposing any changes. N.Y. S 594, § 5.

²⁰ N.Y. S 594, §2. The commission may also recommend revisions of campaign contribution limits to the state legislature. N.Y. S 594, §6.

²¹ N.Y. S 594, §2

enforcement umbrella are: 1) state officers and employees, 2) candidates for state office, 3) members of the legislature, 4) lobbyists, 5) government contractors, and 6) anyone seeking to influence state elections.²²

While JCOPE and LEC could only issue civil penalties or refer a violation to a prosecutor, the new commission could, in addition to these two powers, caution, admonish or censure a violator and suspend, demote or terminate a non-elected state officer or employee.²³

The new ethics watchdog would be composed of nine members a majority of which would be appointed by members of the judiciary. The nine members would be appointed as follows: 1) five jointly by the chief judge of the State of New York and the presiding justices of each of the appellate divisions,²⁴ 2) two jointly by the governor, the attorney general and the comptroller,²⁵ 3) one jointly by the leaders of the Assembly and the Senate for the party whose gubernatorial candidate received the most votes in the most recent election,²⁶ and 4) one jointly by the leaders of the Assembly and the Senate for the party whose gubernatorial candidate received the second most votes in the most recent election.²⁷ An individual would be barred from serving in the commission if, within the previous three years, she's held office in a political party organization, or worked as lobbyist, or has been a state employee or officer.²⁸ Under the new amendment the appointing authority would not have the power to remove its appointee, and ex-parte communications between commission members and their respective appointing authority would be expressly forbidden.²⁹

Finally, the commission is guaranteed funding in an amount "adequate to support the commission's discharge of its fiduciary duty to the people",³⁰ and this amount has to be at least ten percent of the funding allocated to the state law department.³¹

What are the next steps and the odds that the constitutional amendment will pass?

The soonest that this amendment could come up for a popular vote is 2021. New York constitutional amendments have to pass in the legislature twice before they can come up for popular vote, so the New York legislature would have to pass the amendment during its 2019 session and its 2020 session if the amendment was to have any chance of coming up for a vote in 2021. Of course, any delay in the legislature would delay such timeline and as of now, the future of the bill is unclear.³² The bill has sponsors and support in both the senate and the assembly and Governor Cuomo has expressed an interest in reforming the current ethics framework within the state.³³ In addition, there appears to be broad support among the legislature for electoral and campaign finance reform, although as of now it does not appear that enough support has coalesced around this particular amendment.

What comes next?

JCOPE and LEC have faced questions regarding the independence of its members and the efficacy of their enforcement operations. Proponents of the new ethics commission view these issues as stemming from structural issues in the makeup of these two commissions, and thus have endeavored to design a single commission that has a broad enforcement mandate and is better insulated from partisan influences. However, ethics reform has long been a topic of discussion in Albany and it remains to be seen whether the legislature will actually support the creation of a body with the enforcement power and independence.

²² N.Y. S 594, §2. It's unclear how broad this category is, but one would expect it to at least include major political donors. As written, it includes anyone who has made any sort of monetary contribution and potentially anyone who engages in any sort of political activism.

²³ *Id.*

²⁴ *Id.* At most 3 of the appointees may belong to the same political party at the time of the appointment or within the past five years prior to the appointment.

²⁵ *Id.* At least one of the appointees must not have been, within the past five previous years prior to the appointment, enrolled in the same political party as the governor.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ N.Y. S 594, §4

³¹ *Id.*

³² Rachel Silberstein, *Lawmakers, civic groups push for JCOPE replacement*, Times Union (Jan 8. 2019), <https://www.timesunion.com/news/article/Lawmakers-civic-groups-push-for-JCOPE-replacement-13517687.php>

³³ Rachel Silberstein, *Lawmakers, civic groups push for JCOPE replacement*, Times Union (Jan 8. 2019), <https://www.timesunion.com/news/article/Lawmakers-civic-groups-push-for-JCOPE-replacement-13517687.php>