

November 12, 2020

To: Senate Government Operations Committee

Re: Ethics Code Enforcement Considerations

## **Statement of the Vermont State Ethics Commission Regarding Enforcement of the Vermont Code of Ethics**

The Vermont Ethics Commission (“Commission”) continues its efforts to work with the legislature and other public officials to finalize the first statutory state Code of Ethics (“Code”). In addition to this process, the Senate Government Operations Committee has asked the Commission for thoughts on potential principles and procedures to ensure compliance with the Code. The Commission provides this preliminary response.

### **A Clear, Fair, and Impartial Enforcement Function Is the “Gold Standard” for an Effective Ethics Commission**

The Commission believes that a clear, fair, and impartial enforcement mechanism is a necessary component of any meaningful ethics program. According to the National Conference of State Legislatures, the [majority of state ethics agencies](#) are granted authority to investigate and administratively prosecute ethics complaints. The Center for Public Integrity (“CPI”) has a full category for “Ethics Enforcement Agencies” in its State Integrity Investigations (in which category [Vermont finished last among the states in 2015](#), the year of the last report). In its 2018 report on Vermont’s governmental integrity, Columbia University’s Center for the Advancement of Public Integrity noted that, although the state did not “seem” to have much corruption, uncertainty still existed [“because of the weakness of its laws and enforcement system.”](#) To approach national models for state ethics, Vermont will at some level be judged by its ability to enforce its Code. The vast majority of public employees and officials will doubtless abide by the Code, and the Commission will support them with education and advice. Nevertheless, the Commission is mindful that a scant few individuals will nevertheless snub the Code for their own personal gain. Thus, without enforcement, the Code is merely aspirational, and would stand little chance of success in being able to establish and maintain an ethical culture in state government.

### **Enforcement of Ethics Code Compliance Should Not Begin until Public Servants Receive Adequate Ethics Training**

Although enforcement is a necessary component of any meaningful state ethics program, the Ethics Commission believes, as a matter of fairness and practicality, that our public servants, state employees and officials should have adequate opportunity to be educated and trained on their specific ethical obligations prior to being subject to enforcement. The Commission believes that, following finalization of the Code, government-wide ethics training should be the first and main priority for the Commission (and the legislature). During this training period, all public servants subject to the Code should have an opportunity to identify any existing conflicts of interest. They should have the opportunity to seek individualized advice and guidance from the Commission regarding those possible conflicts of interest. And they should have the opportunity to “cure” any, all before an enforcement program begins.

## **A Meaningful Ethics Program Should Balance Ethics Code Enforcement and Vigorous Protection of the Due Process Rights of the Accused**

The Commission believes that any public servant accused of violating the Code should have a clear understanding of enforcement procedures. Each is entitled to protections that will ensure fairness and impartiality. The Commission looks forward to continuing to work with the legislature and other stakeholders in crafting an enforcement process that remains focused on balancing compliance with fairness. Along the way, there are several enforcement principles that the Commission believes deserve particular focus and further discussion.

### **1. Statute of Limitations**

The Commission believes that the enforcement process should have a statute of limitations to limit investigation of past allegations. As a threshold matter, any alleged misconduct that occurred prior to the enactment of the Code should not be the subject of a complaint. Following enactment of the Code (and training thereon), a reasonable statute of limitations should be imposed on the filing of a complaint. At this point, the Commission points the legislature to the state's general statute of limitations ([12 VSA § 511](#) and [12 VSA § 461](#)) and suggests six years from the date of the alleged misconduct.

### **2. Complaint Process**

Any enforcement mechanism should provide for the Commission's independent ability to file a complaint when it has probable cause to believe that a violation of the Code has occurred. In addition, the Commission believes that members of the public should have the opportunity to file complaints of alleged misconduct, provided that the Commission has the opportunity to reject complaints that are not within the Commission's jurisdiction, or otherwise fail to state an alleged violation of the Code.

### **3. Notice**

The Commission believes that the subject of a complaint – the “respondent” – should be provided notice of a complaint when it is received by the Commission, and that the respondent should have the opportunity (but not the obligation) to respond to the allegations. In addition, both the complainant and respondent should be entitled to know when a complaint has been dismissed, and the reasons for the dismissal.

### **4. Investigation Process**

The Commission believes that, like all state agencies involved in contested cases, the agency should have the ability to compel the production of documents and testimony in its investigations, and the ability to enforce compliance with subpoenas. See, e.g., [3 VSA § 809a](#). The respondent should have the right to representation and participation in the investigative process. The respondent should also have the right to challenge subpoenas issued by the Commission.

### **5. Settlement Process**

As with other state agencies (see, e.g., [3 VSA § 809a\(d\)](#)), the Commission should have the authority to accept a resolution of matters prior to a hearing through negotiated settlement of the claims.

## **6. Hearing Process**

The Ethics Commission looks to the state's statutes for hearings in contested cases in Administrative Procedures Act ("APA," [3 VSA §§ 809 et seq.](#)) as a template for future hearings to enforce an adopted Code of Ethics. Usage of the APA model (which has been used by the state for over 50 years) would incorporate administrative due process rights and evidentiary standards. It would provide clarity and predictability for respondents in enforcement matters. At a minimum, public servants accused of ethics code violations should be entitled to appear; argue; testify; be represented by counsel; cross-examine witnesses; challenge evidence; and present evidence and witnesses in their defense. The Ethics Commission believes that any finding by the Commission should be in writing and be a matter of public record.

## **7. Penalties**

The Commission believes that the model incorporated by a plurality of states – which includes civil monetary penalties and injunctive relief to prevent future misconduct – is the most effective deterrence model for those who have been found, after a hearing, to have violated the Code. In addition, the Commission believes that any illegal financial gain should be returned to the state.

## **8. Post-Hearing Process**

As with the APA, the Commission believes that parties should have a right to appeal a ruling of the Ethics Commission following a hearing.

## **9. Confidentiality**

The Ethics Commission believes that certain confidentiality rights may be appropriate for a respondent during the investigative and hearing process. See, e.g., [Kamasinski v. Judicial Review Council, 44 F.3d 106 \(2d Cir., 1994\)](#). During this period the Commission would not disclose the matter or the identity of a respondent, nor would the records be subject to public disclosure during this time. Many states follow a model in which a matter remains confidential until the agency finds there is probable cause to believe that an ethics code violation has occurred. Only then should a matter become public.

## **10. Safe Harbor**

The Ethics Commission believes that state's ethical interests are best served by focusing on prevention over punishment. To this end, public employees and officials should be strongly encouraged to seek advice from the Commission in advance of engaging in any conduct that may be questioned. A public servant who does and then relies upon written Ethics Commission advice should be immune from later prosecution if a complaint regarding that conduct is filed.

Respectfully submitted,

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