

## PRINCIPLES FOR DESIGNING AN INDEPENDENT ETHICS COMMISSION

Citizen demands for ethics accountability have put new state ethics commissions on the ballot for 2018

### Executive Summary

Poll<sup>1</sup> after poll<sup>2</sup> indicates the public's growing distrust of American government institutions and, to a degree, democracy itself. Americans expect the people who work for them to be accountable for their actions. A strong independent ethics agency is an essential part of a government that is representative, responsive, and accountable. This type of agency, referred to here as an "ethics commission," provides oversight that is critical to a functional democratic system by overseeing ethics, financial disclosure, lobbying, and campaign finance laws.

Taking steps at the state and local levels is critical to the success of instilling ethical standards and principles in government. In New Mexico and South Dakota, voters will be going to the polls this year to decide whether they should join their 44 sister states, and countless cities, towns, and counties, in adopting an ethics commission.<sup>3</sup> Vermont established a new ethics commission on January 1, 2018;<sup>4</sup> the City of Pittsburgh recently revamped its Ethics Hearing Board;<sup>5</sup> and Sandoval County in New Mexico is in the process of approving its first ethics commission.<sup>6</sup>

A well-designed and well-resourced ethics commission can help build public trust in government by creating a culture of integrity and holding officials accountable for violations of the public trust. Ethics, financial disclosure, lobbying, and campaign finance laws are intended to provide citizens with a level of transparency regarding who is trying to influence government and to hold officials accountable for real and perceived conflicts of interest. To fulfil these goals, an ethics commission must be built on the principles of independence, accountability, and transparency.

### Independence and Structure

An ethics commission must be independent of the officials it oversees to make clear that the commission serves the public interest and not the personal interests of public

officials. A state or local government must make decisions regarding where the commission fits in government, the structure and composition of the commission, and the staff that support the commission.

### Where Does an Ethics Commission Fit in Government?

Because it can be difficult for an ethics commission to be independent from other branches of government, an ethics commission should have features that allow it to operate as independently as possible. An ethics commission benefits from these legal arrangements by making clear that its activities are less dependent on the officials it oversees. States and cities across the country approach this question in different ways:

- In Colorado, the Independent Ethics Commission was moved from the executive branch to the judicial branch to maintain its independence and autonomy.<sup>7</sup>
- Missouri's Ethics Commission is established under the executive branch, but only for limited budgeting and reporting purposes. The executive branch in Missouri is prohibited from performing other supervisory duties and may not interfere with the work of the commission.<sup>8</sup>
- Oakland, CA, and Jacksonville, FL, established their commissions in their city charters, ensuring that they can be changed only by the more difficult process of amending the charter.<sup>9</sup>

### How Should the Commission Be Structured?

An ethics commission should be structured to effectively and fairly enforce the laws it administers. Unless the commission has built-in mechanisms to prevent partisan deadlock, the commission should have an odd number of commissioners. Having an odd number of commissioners ensures that the commission will be able to make decisions when voting on administrative regulations, enforcement matters, or other actions. In the case that a commission has an even number of commissioners, often with a bipartisan split to prevent one political party from dominating commission votes, there should be features that prevent it from paralysis by deadlocked votes. A commission that has an even number of commissioners should have a strong chairperson position that has agenda-setting authority or require that only a majority vote of the commission can overrule the recommendations of the general counsel. A commission should also avoid having too many commissioners because it dilutes accountability for individual commissioners and can make reaching consensus difficult. Typical commissions have between five and nine commissioners.<sup>10</sup>

## How Should Commissioners Be Selected?

The process for selecting commissioners should ensure that a commissioner is independent of the person making the appointment. A common procedure is to have the executive and legislative leadership split nomination and confirmation duties. Another approach is to require that appointments be made by a nominating commission or local civic organizations that do not include the government officials the ethics commission oversees.

- Minneapolis's Ethical Practices Board is appointed by a committee made up of the Chief Judge of the Hennepin County District Court and the deans of the University of Minnesota and University of St. Thomas law schools; the nominations are supplemented by recommendations from nonpartisan civic groups and colleges.<sup>11</sup>
- For Milwaukee's Board of Ethics, seven local organizations, including the local chamber of commerce and the local NAACP chapter, submit nominees for appointment by the mayor.<sup>12</sup>
- In Maryland, the governor appoints three members, one of whom must be from the principal political party of which the governor is not a member. The governor also appoints a member nominated by the speaker of the house and a member nominated by the president of the senate.<sup>13</sup>

## Who Can Serve?

It should be clear to the public that the ethics commission serves the public interest and not the interests of those groups subject to the commission's oversight. A commission can demonstrate this independence by prohibiting a person from serving as a commissioner if that person is an elected official, a candidate for office, a contractor with state or local government, an employee of the state or local government, a lobbyist, or campaign consultant. In a similar vein, some commissions restrict commissioners from supporting election or ballot measure campaigns or from running for office for a certain time before or after serving as a commissioner.

- Oakland's ethics commissioners may not be employed by the city or have any direct or financial interest in any city activities, seek election to public office or contribute to municipal campaigns, or support any candidate or measure in an Oakland election.<sup>14</sup>
- Vermont's ethics commissioners may not be state employees or hold any legislative, executive, or judicial office; hold or enter into a lease or contract with the state; be a lobbyist; be a candidate for state or legislative office; or hold office in a state or legislative office candidate's committee, a political committee, or a

political party.<sup>15</sup>

- Oklahoma's ethics commissioners are not eligible to run for elected office for two years after the end of the commissioner's term.<sup>16</sup>

To further insulate an ethics commission from political meddling and allow commissioners to work independently of the interests of public officials, jurisdictions should provide that commissioners may only be removed for cause.<sup>17</sup> This safeguard allows commissioners to do their work without fear of reprisal.

- A commissioner on Massachusetts' State Ethics Commission may be removed only for substantial neglect of duty, inability to discharge the powers and duties of the office, violations of certain prohibitions on commissioner activities, gross misconduct, or conviction of a felony.<sup>18</sup>
- A commissioner on California's Fair Political Practices Commission may only be removed for substantial neglect of duty, inability to discharge the powers and duties of office, or a violation of certain prohibitions on commissioner activities.<sup>19</sup>

A jurisdiction must also decide how long a commissioner may serve. Commissioners are typically appointed to serve staggered terms of four or five years. Some commissions have explicit rules limiting commissioners to one or two terms while others have no term limits.<sup>20</sup>

### Dedicated Staff

An ethics commission should have sufficient dedicated, paid staff to administer its laws. First, a commission should have an executive director and other administrative support staff to ensure that the commission keeps up with its work and is properly resourced. Second, a commission should have its own independent experts, including investigators, auditors, general counsel, and trainers. By relying on these independent experts, a commission can not only obtain independent advice and analysis of facts and law in specific cases, but also avoid the appearance that it depends on an elected official or appointee of an elected official, such as a secretary of state or city attorney.

- The Florida Commission on Ethics is required to hire an executive director and provide the executive director with office space, assistants, and secretaries.<sup>21</sup>
- Philadelphia's city charter requires its Board of Ethics to appoint an executive director, legal counsel, and other staff, subject to budget constraints.<sup>22</sup>

## Enforcement and Disclosure

An ethics commission should be structured to have the authority necessary to hold

public officials accountable and maintain the public trust. This oversight may also overlap with a legislature's internal ethics review process, such as an ethics committee of a state legislature.<sup>23</sup> In establishing an ethics commission, jurisdictions should take into account that aspect of coordinating ethics enforcement between various interested entities when determining commission oversight responsibilities.

### Enforcement

An ethics commission must have the ability to take actions to enforce ethics, lobbying, campaign finance, and financial disclosure laws to ensure effective oversight. The key powers for a commission include:

- Receiving and evaluating complaints.
  - The commission should be able to receive complaints from any member of the public.
  - While many ethics commissions require a sworn or verified complaint, each jurisdiction should carefully consider whether this requirement could have a chilling effect on potential complainants.
  - California's Fair Political Practices Commission allows any person to file a complaint as a sworn complaint, a non-sworn complaint, or an anonymous complaint.<sup>24</sup>
- Conducting audits, investigations, and hearings.
  - A commission should be able to subpoena witnesses and documents. Depending on the state constitution or local charter, to give a commission this subpoena power, it may be necessary to take additional steps, such as making this power enforceable by a court.
  - A commission should be able to initiate investigations on its own and perform regular audits. Some commissions are required to audit a certain percentage of political committees or other entities to encourage compliance with reporting requirements.
  - The Oregon Government Ethics Commission may initiate investigations based on complaints from any person or on its own motion.<sup>25</sup>
- Issuing orders compelling compliance and imposing civil fines and penalties for violations, with appropriate recourse to challenge those penalties.
- Referring appropriate cases for criminal prosecution.

## Disclosure

A commission should publicly disclose its enforcement actions, regardless of whether the commission issues a sanction or finds no violation, to foster transparency in government and to enhance the commission's credibility with the public.

- Florida's Commission on Ethics is required to publish its findings for each investigation.<sup>26</sup>
- Atlanta's Board of Ethics is required to make its findings and decision public as soon as is practical after the commission reaches its decision.<sup>27</sup>

## Training and Advice

Because transparency is a touchstone of effective ethics oversight, an ethics commission should provide the public and the people it oversees with information regarding the laws it administers and how to comply with those laws. Providing training, advice, and recommendations for legislative changes furthers an ethics commission's mission of creating a culture of integrity by educating the public and demonstrating how the commission functions.

### Training

An ethics commission should be required to provide trainings for government officials and employees. Training provides an opportunity for people in government and people working with the government to become familiar with local laws and understand what is required, permitted, or prohibited. Without a useful training program, officials and others doing business with the government may not be able to adequately recognize or resolve possible ethics problems.<sup>28</sup> Depending on the availability of resources, there may be various ways for an agency to provide this outreach: in-person presentations, online trainings, written materials, or even on-call staff to answer questions over the phone or through a website.

- The Connecticut Citizen's Ethics Board and Office of State Ethics provides training for all state employees annually.<sup>29</sup>
- The Memphis Board of Ethics is required to supervise the training of all city officers and employees regarding their ethics obligations.<sup>30</sup>

### Advice

A commission should be empowered to serve as an advisory body, providing guidance to individuals subject to ethics, campaign finance, financial disclosure, and lobbying laws. This service educates people who are subject to the commission's oversight,

helping them avoid violations and penalties. Advisory opinions should have legal significance: a public official who relies on an opinion when taking an action should be able to assert that reliance as a defense against liability for a violation of the law.

- The Arkansas Ethics Commission is specifically empowered to provide advisory opinions and guidelines for the laws it oversees and enforces.<sup>31</sup>
- In Iowa, Boise, ID, and the ethics commission legislation under consideration in Sandoval County, NM, a person who relies on an advisory opinion can use that reliance as a safe harbor against liability for a violation of the law.<sup>32</sup>

Further, advisory opinions should be published in order to demonstrate the role the commission plays in overseeing public officials and provide education on these laws for the wider public. Providing advisory opinions can help an ethics commission achieve one of the most important ethics goals: encouraging public officials to think ahead about and ensure professional handling of ethical conflicts.<sup>33</sup>

### Legislative Recommendations

As an expert in often complex regulatory landscapes, an ethics commission should regularly provide recommendations for changes to ethics, lobbying, campaign finance, and financial disclosure laws. In addition to the power to create rules for administering these laws, a commission is often best positioned to evaluate how well a law is working and the ways in which a law may be overbroad, underinclusive, or otherwise deficient for effective oversight. These recommendations can educate lawmakers and the public about the state of oversight and accountability laws that apply in their jurisdiction.

- The Board of Ethics in Sioux Falls, SD, is tasked with recommending legislative action to effectuate the ethics policies it oversees.<sup>34</sup>
- Connecticut's Citizen's Ethics Board and the Kansas Government Ethics Commission are required to annually provide recommendations for legislative action to their legislatures.<sup>35</sup>

## A Culture of Integrity

Creating a culture of integrity is an intangible best practice at the heart of an ethics regime. Because this culture cannot easily be written into rules or policy, it is the best practice that is most challenging to achieve.<sup>36</sup> A commitment to ethical government, without any real or perceived bias, is necessary in selecting commissioners, hiring staff, and executing the commission's duties. It is also important to foster this commitment in the people the commission oversees. While difficult to achieve, the results would be obvious: more public officials seeking advice to understand their ethical obligations

and to prevent any ethics violations, more public support for an ethics commission, and an electorate that holds their elected officials at the ballot box for ethical failures.

## ABOUT THE CAMPAIGN LEGAL CENTER

Campaign Legal Center (CLC) is a nonpartisan, nonprofit organization based in Washington, D.C. Through litigation, policy analysis and public education, CLC works to protect and strengthen the U.S. democratic process across all levels of government. CLC is adamantly nonpartisan, holding candidates and government officials accountable regardless of political affiliation.

CLC was founded in 2002 and is a recipient of the prestigious MacArthur Award for Creative and Effective Institutions. Our work today is more critical than ever as we fight the current threats to our democracy in the areas of campaign finance, voting rights, redistricting, and ethics.

Most recently, CLC argued *Gill v. Whitford*, the groundbreaking Supreme Court case seeking to end extreme partisan gerrymandering. In addition, CLC plays a leading watchdog role on ethics issues, providing expert analysis and helping journalists uncover ethical violations. CLC participates in legal proceedings across the country to defend the right to vote.

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<sup>1</sup> *Public Trust in Government 1958-2017*, PEW RESEARCH CENTER (Dec. 14, 2017), <http://www.people-press.org/2017/12/14/public-trust-in-government-1958-2017/>.

<sup>2</sup> Jeffrey Jones et al., *How Americans Perceive Government in 2017*, GALLUP (Nov. 1, 2017), <http://news.gallup.com/opinion/polling-matters/221171/americans-perceive-government-2017.aspx>.

<sup>3</sup> National Conference of State Legislatures, *State Ethics Commissions: Jurisdiction*, <http://www.ncsl.org/research/ethics/50-state-chart-state-ethics-commissions-jurisdic.aspx> (last visited May 10, 2018).

<sup>4</sup> *Vermont creates first-ever ethics commission in wake of Center stories*, THE CENTER FOR PUBLIC INTEGRITY (JUNE 14, 2017), <https://www.publicintegrity.org/2017/06/14/20922/vermont-creates-first-ever-ethics-commission-wake-center-stories>.

<sup>5</sup> Adam Smeltz, *City ethics board opens an office*, PITTSBURGH POST-GAZETTE (Nov. 1, 2016), <http://www.post-gazette.com/local/city/2016/11/21/City-ethics-board-opens-an-office/stories/201611210037>.

<sup>6</sup> Stephen Montoya, *County ethics law moves forward*, rrobserver.com, Apr. 6, 2018, [http://www.rrobserver.com/news/article\\_7230781a-39d9-11e8-841b-fbe58b4b4001.html](http://www.rrobserver.com/news/article_7230781a-39d9-11e8-841b-fbe58b4b4001.html).

<sup>7</sup> Colorado Independent Ethics Commission, National Conference of State Legislatures, <http://www.ncsl.org/portals/1/documents/ethics/colorado.pdf>.

<sup>8</sup> Mo. Rev. Stat. §105.955.

<sup>9</sup> Oakland, Cal., Charter, art. VI, § 603; Jacksonville, Fla., Charter, art. I, § 202.

<sup>10</sup> Megan Comlossy, *Ethics Commissions: Representing the Public Interest*, THE LEGISLATIVE LAWYER (2011), [http://www.ncsl.org/documents/lss/Ethics\\_Commissions.pdf](http://www.ncsl.org/documents/lss/Ethics_Commissions.pdf).

<sup>11</sup> Minneapolis, Minn. Code § 15.210(a).

<sup>12</sup> Milwaukee, Wis. Code § 303-15.

<sup>13</sup> Md. Code, Gen. Provisions § 5-202(a).

<sup>14</sup> Oakland, Cal. Code § 2.24.050.

<sup>15</sup> Vt. Stat. Ann. tit. 3, § 1221(3).

<sup>16</sup> Okla. Const. art. XXIX, § 1.

<sup>17</sup> Vt. Stat. Ann. tit. 3, § 1221(4).

<sup>18</sup> Mass. Gen. Laws ch. 268B, §2(g).

<sup>19</sup> Cal. Gov. Code § 83105.

<sup>20</sup> Megan Comlossy, *Ethics Commissions: Representing the Public Interest*, THE LEGISLATIVE LAWYER (2011), [http://www.ncsl.org/documents/lss/Ethics\\_Commissions.pdf](http://www.ncsl.org/documents/lss/Ethics_Commissions.pdf) (last visited May 9, 2018).

<sup>21</sup> Fla. Stat. § 112.321(4).

<sup>22</sup> Philadelphia, PA, Home Rule Charter, § 3-806(g).

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- <sup>23</sup> National Conference of State Legislatures, *Committees and Commissions: What's the Difference?*, <http://www.ncsl.org/research/ethics/committees-amp-commissions-whats-the-differenc.aspx>.
- <sup>24</sup> California Fair Political Practices Commission, Electronic Complaint System, <http://www.fppc.ca.gov/enforcement/electronic-complaint-system.html>.
- <sup>25</sup> Or. Rev. Stat. § 244.260(1)(b).
- <sup>26</sup> Fla. Stat. § 112.322(2)(b).
- <sup>27</sup> Atlanta, Ga. Charter, art. VII § 2-806(5)c.
- <sup>28</sup> ROBERT WECHSLER, LOCAL GOVERNMENT ETHICS PROGRAMS: A RESOURCE FOR ETHICS COMMISSION MEMBERS, LOCAL OFFICIALS, ATTORNEYS, JOURNALISTS, AND STUDENTS, AND A MANUAL FOR ETHICS REFORM 459 (2d ed. 2013).
- <sup>29</sup> Conn. Gen. Stat. § 10-1-81(5).
- <sup>30</sup> Memphis, Tenn. Code § 2-10-10(B)5.
- <sup>31</sup> Ark. Code § 7-6-217(g)(2).
- <sup>32</sup> Iowa Code § 68B.32A(12.); Boise, Idaho Code § 2-24-02; Sandoval Cnty, N.M. Draft Ordinance § 8 (j) (2), available at: <http://www.sandovalcountynm.gov/wp-content/uploads/2018/03/Final-Draft-Sandoval-County-Ethics-Ordinance-v10.4.17.pdf>.
- <sup>33</sup> WECHSLER, LOCAL GOVERNMENT ETHICS PROGRAMS 402.
- <sup>34</sup> Sioux Falls, S.D., Code § 35.010(i).
- <sup>35</sup> Conn. Gen. Stat. § 10-1-81 (6); Kan. Stat. Ann. § 25-4119a(f).
- <sup>36</sup> *Fighting "Small Town" Corruption*, CENTER FOR THE ADVANCEMENT OF PUBLIC INTEGRITY (2016), [http://www.law.columbia.edu/sites/default/files/microsites/public-integrity/files/fighting\\_small\\_town\\_corruption\\_-\\_capi\\_practitioner\\_toolkit\\_-\\_october\\_2016\\_1.pdf](http://www.law.columbia.edu/sites/default/files/microsites/public-integrity/files/fighting_small_town_corruption_-_capi_practitioner_toolkit_-_october_2016_1.pdf).