

**Alert | New York Government Law & Policy**



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## **Evaluating New York State Lobbying & Ethics Compliance Obligations in Light of Court Invalidation of State Ethics Commission**

The Albany County Supreme Court issued a lengthy decision on Sept. 11, 2023, in *Cuomo v. NYS Commission on Ethics and Lobbying in Government*, apparently invalidating the statutory authority for the Commission on Ethics and Lobbying in Government (COELIG). Notwithstanding this conclusion, lobbyists, lobbying clients, and public officials should continue to assume they will be at risk for penalties if they fail to abide by the laws and regulations that govern New York lobbying activity, the offering and acceptance of gifts, and other reporting or ethical standards.

New York has a history of restructuring its ethics and lobbying commissions following times of government scandal. For example, in 2007 the state revamped its oversight bodies, consolidating the State Ethics Commission and the Temporary State Commission on Lobbying to form the Commission on Public Integrity (COPI). Four years later, as a result of the “Public Integrity Reform Act of 2011,” COPI was replaced with the Joint Commission on Public Ethics (JCOPE). Most recently, JCOPE was abolished pursuant to the Ethics Commission Reform Act of 2022 and, since the summer of 2022, lobbying and governmental ethics in New York has been governed by COELIG.

Since its inception, COELIG has described its mission as “oversee[ing], regulat[ing] and ensur[ing] compliance with New York State’s ethics and lobbying laws.”<sup>1</sup> This includes imposing regular registration and reporting obligations on lobbyists (and their clients), as well as enforcing the state’s ethics laws on public officials; both functions that previously had been conducted by JCOPE. COELIG was formed following a spate of public critique that JCOPE’s commissioners were too beholden to their appointing authorities and too subject to political winds. To address this, the Governor and legislature created a new appointment process for the commission, pursuant to which leadership from the executive and the legislature are empowered to nominate commissioners, but the nominees are then subject to screening and ultimate approval by an independent review committee (IRC), comprised of “New York state law school deans . . . or their designee.”<sup>2</sup>

Before dissolving, JCOPE began an investigation into New York’s previous governor and whether he violated the Public Officers Law in relation to his work and being compensated for authoring a book related to his government service. When COELIG assumed JCOPE’s regulatory functions, they proceeded with this enforcement action, ultimately penalizing former Governor Andrew Cuomo. Cuomo, in turn, asserted that COELIG could not enforce the Public Officers Law, as the entity’s formation violated the New York State Constitution. Specifically, in a lawsuit commenced in April 2023, Cuomo asserted that COELIG was *too* independent – arguing the new commissioner appointment process that relies on an unelected IRC to make final determinations about appointees violates “separation-of-powers principles” and denies the Governor executive enforcement powers.

The Albany County Supreme Court concurred with this assertion, observing that “[n]ever in New York’s history has the legislature conceived a body that exercises executive authority where the Governor’s role is confined only to nominating a minority of that body,” particularly not a body that is subject to the vetting and appointment by “private operators (like a bunch of deans).” The court concluded, that COELIG’s powers are “not [a] law-making function but the law enforcement function,” a uniquely “executive power belonging to the executive branch.” Yet, in seeking to insulate the commission from political influence, the 2022 Executive Law “yanks enforcement responsibility of the ethics laws from the Governor . . . since a commissioner can only be removed by fellow commissioners (and not the Governor), [and] the commission answers to no elected officers.” Accordingly, the Court reasoned, the Executive Law provisions relating to COELIG’s investigation and enforcement powers, and authority emanating therefrom, are unconstitutional and “the commission’s core purpose . . . has been taken from it.” The Court’s Decision and Order affords COELIG the opportunity to argue at a subsequent hearing why the rest of its underlying statutes should survive but enjoins the commission from enforcing the lobbying and ethics laws.

This does not mean that lobbyists are free to treat this as a holiday from complying with disclosure reports, nor that lobbyists or New York government officials should ignore the ethical and gift obligations emanating from the Legislative Law and Public Officers Law. For example, lobbyists registered with COELIG should continue to file the July/August bimonthly reports due by Sept. 15. In fact, COELIG’s chair and executive director have publicly expressed their disagreement with the court – asserting that “the state ethics and lobbying laws . . . remain intact,” and that COELIG will continue to ensure compliance with those laws while the litigation continues.<sup>3</sup> Governor Hochul has similarly stated that the state will be appealing the Albany Supreme Court decision. Accordingly, the constitutional question is

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<sup>1</sup> *COLEG Jurisdiction and Authority*.

<sup>2</sup> See N.Y. Exec. Law 94(2), (3). The IRC is empowered to “approve or deny” the commissioner candidates named by the Governor, majority and minority legislative leadership, attorney general, and comptroller. There is no recourse for the public officials if their nominee is rejected by the IRC other than to “nominate a new candidate.” N.Y. Exec. Law 94(3)(d).

<sup>3</sup> *Statement from Chair Fredrick A. Davie and Executive Director Sandford N. Berland*.

expected to be heard by the Appellate Division, Third Department, and then the Court of Appeals. Consistent with New York State Civil Practice Law and Rules, the state will likely be accorded an automatic stay of the lower court decision throughout the appeals process. Concurrently, the legislature may consider statutory changes to address the concerns raised by the Court or, more dramatically, reexamine proposals to start a multi-year constitutional amendment process to insulate the current ethics commissioner appointment process.

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