

Coalition for Integrity

Chairman Jim Kasper and Members of the House Special Ethics Committee
66th North Dakota Legislative Assembly
State Capitol
Bismarck, North Dakota 58505

Dear Chairman Kasper and Members of the House Special Ethics Committee:

We are writing on behalf of the Coalition for Integrity, a non-profit organization which works with a broad network of individuals and organizations to combat corruption and promote integrity in the public and private sectors. When government is for sale, it destroys public trust in democratic institutions and denies people the right to accountable, responsive government and the rule of law. Our view is simple: Democracy is best served when elected officials are wholly committed to representing the public interest.

The citizens of North Dakota recognized the importance of honest government in November 2018 with approval of Article XIV to the North Dakota State Constitution. Creating an effective Ethics Commission is a challenge for the Legislature and one that would benefit from the experience of other states.

Background. Last October, the Coalition for Integrity released its [States With Anti-Corruption Measures for Public officials \(S.W.A.M.P.\) Index](#). The index rates the 50 States and District of Columbia based on the laws and regulations governing ethics and transparency in the executive and legislative branches of individual states. North Dakota scored 0, a reflection of the lack of an ethics agency, no meaningful gift rules and a lack of transparency in campaign finance and potential conflicts of interest.

The S.W.A.M.P. Index focuses on eight questions relating to the jurisdiction and scope of ethics agencies, the powers of those agencies, acceptance and disclosure of gifts by public officials, transparency of funding independent campaign expenditures and client disclosure by legislators. Some of the key findings are:

- No state achieved a perfect score; in fact, there is no state in the top 20th percentile.
- 36 states scored 60 or below and 21 states scored 50 or below.
- Three states Washington (78), Rhode Island (75) and California (75) land at the top of the score chart.



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In crafting the legislation to enact Article XIV, the legislature should incorporate measures that the Coalition for Integrity describes as a minimum legal framework to promote ethical behavior and transparency.

- The ethics agency must be completely independent of the executive and legislative branches.
- The agency should have jurisdiction over all officials, elected and appointed, as well as employees of the executive and legislative branches.
- The agency needs wide powers to investigate alleged violations of ethics rules, including the ability to subpoena individuals and documents.
- To promote transparency, hearings regarding alleged violations should be open to the public.
- The agency should have the authority to sanction all government personnel.
- Gift rules should apply equally to all government officials and should prohibit all gifts above a nominal threshold, regardless of the source and regardless of the intent of the recipient or the gift-giver.
- Legislators should disclose the names of all clients for whom they work, whether the client directly hires the legislator or hires the entity which employs the legislator.
- States should take the lead in mandating disclosure of the beneficial owners of LLCs and donors to 501(c) organizations which contribute to independent campaign spenders.

North Dakotans are to be congratulated on adopting the last of these measures. Article XIV and Senate Bill 2148 (SB 2148) go further than any other state in requiring the “ultimate and true source of funds spent” in any state-wide campaign. Making these disclosures a reality will require vigorous enforcement by the Ethics Commission.

Comments on Proposed Legislation. There are a few points to be made about both HB 1521 and Senate Bill No. 2148 (SB 2148).

- Whistleblower Protection. Article XIV requires the establishment of a whistleblower hotline for reporting violations of ethical rules. The purpose of a whistleblower mechanism is to protect the person reporting a violation from retaliation, punishment or other sanction. Yet neither bill particularly protects the whistleblower and HB 1521 requires that person’s identity to be revealed to the alleged offender. SB 2148 requires the Ethics Commission to provide an accused individual with a copy of a complaint which might reveal the identity of the complainant (§ 54-66-05) and states that a complainant be interviewed as part of an investigation (§ 54.66.07(1)). HB 1521 requires



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a complainant to provide name, address and phone number, and an attestation of accuracy. (54-66-05(1 -2)). It then says the Ethics Commission “shall inform an accused individual by registered mail of the identity of the complainant . . .” (§ 54-66-06). This provision destroys the whole purpose of providing a whistleblower hotline.

- Jurisdiction of the Commission. The Ethics Commission should be given the authority over all public employees, not just those defined in Article XIV as public officials. For example, employees working on procurement or rule-making should be subject to the same ethical rules regarding conflicts of interest, gifts, post-government employment, etc. as public officials. Although these persons are not mentioned in Article XIV, there is nothing in the Article to keep the legislature from expanding the jurisdiction of the Ethics Commission to include all government employees. The scope of jurisdiction of an ethics agency varies from state to state but in 29 states all executive branch officials and employees and legislators are covered by an independent ethics agency.
- Public Hearings. There is a lack of transparency in the operation of the Commission. It is certainly proper to protect an individual’s reputation against allegations of improper behavior. But once the Commission has found probable cause that a violation exists, the right to confidentiality of the proceedings and results should cease. There is no reason to treat ethics violations different than criminal violations in this respect. Ethics agencies in 27 states are required to hold public hearings.
- Removal of Commission Members. Neither bill protects the members of the Ethics Commission from removal without cause. The implementing law should state that Commission members cannot be removed except for enumerated reasons. For example, in Delaware, members of the Commission may be removed by the Governor, with the Senate’s concurrence, for “substantial neglect of duty, gross misconduct in office or violation” of the Code of Conduct. [Del. Code tit. 29 § 5808\(b\)](#). Members of the Iowa Ethics Board may only be removed by a district court for cause, such as “willful or habitual neglect or refusal to perform the duties of the office.” [Iowa Code § 66.1A](#).
- Gift Rules. Article XIV restricts gifts from lobbyists but is silent on gifts from others. The implementing legislation should go further and prohibit the acceptance of gifts from anyone other than a close relative or more than a nominal value as determined by the Ethics Commission. The Index shows that states differ markedly in how they regulate acceptance of gifts, in some cases with rules that depend on whether a person is a legislator or in the executive branch or the intent of the giver or the recipient. A



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straightforward, clear prohibition will make it easy for government officials to comply with the rule and reduce the amount of time the Ethics Commission has to spend providing guidance on gift acceptance.

- **Financial Disclosure.** The Ethics Commission should be given the authority to administer a financial disclosure system for public officials and executive branch officials in sensitive positions. Currently North Dakota requires filing a statement of interests only from candidates for state office and persons appointed by the governor to defined positions. [N.D. Cent. Code Ann. § 16.1-09-03](#). Unlike most states, there is no annual filing requirement and the scope of disclosure is limited. A key purpose of a financial disclosure statement is to reveal potential conflicts of interest. This is particularly important in North Dakota where state legislative office is a part-time position. Disclosure should include the identity of clients and customers served directly or through an employer and that information should be updated before every legislative session. With respect to executive branch officials, filing should be annual and not just at the time of appointment. Finally, the Ethics Commission, rather than the Secretary of State, should administer the financial disclosure system as the Commission will have more expertise on conflicts of interest.
- **Investigative Powers.** The investigative powers of the Ethics Commission are not well-developed. Neither bill makes it clear that the Commission can initiate its own investigations or has the power to subpoena individuals or documents as part of an investigation. In cases of conflict of interest, for example, the Commission may need access to bank records or phone records to determine whether a conflict existed. According to the S.W.A.M.P. Index, of the 46 states with independent ethics agencies covering executive branch officials:
 - 36 can initiate and conduct their own investigations
 - 27 are required to hold public hearings
 - 42 have subpoena power
- **Penalties.** Penalties for violations of the ethics rules have to be meaningful to be effective. There are different kinds of penalties that can be adopted, ranging from personnel actions to cease and desist orders to fines. Neither bill incorporates meaningful penalties. S. 2148 says the Commission can “impose a penalty specified by law for the violation,” but no such penalties are specified. §54-66-08(3). HB 1521 excludes termination of employment as a penalty but, as with S. 2148, refers to penalties



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“authorized by law. Attachment 1 sets out the sanctioning authority of all the states and demonstrates that there is a variety of sanctions available.

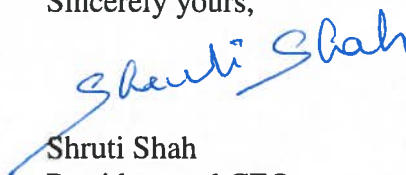
Comments on SB 2148. While it is not possible to comment in detail on the proposed legislation as issues of implementation are left to legislative management, SB 2148 does not include problematic language that runs counter to Article XIV. We are encouraged that Senate Bill 2148 creates an ethics commission with adequate staffing and funding to carry out a variety of duties.

Comments on HB 1521. HB 1521 fails to create an effective ethics commission which could actually draft a Code of Ethics, provide advice to government officials on its implementation, institute training courses to inform government officials of their ethical obligations, investigate on its own initiative or apply meaningful penalties to violators. Instead, HB 1521 says that the Commission “shall meet as necessary to address each complaint the commission receives.” § 54-66-04(2). Furthermore, it provides only part-time administrative staff, to be located in an existing executive branch agency. § 54-66-04(5). While other states may have part-time Commission members, they all have full-time employees providing advice and training, as well as performing enforcement-related duties. As drafted, the Ethics Commission created by HB 1521 is basically toothless, serving no purpose.

Another important failing of HB 1521 is the mis-application of the ultimate donor requirement of Article XIV. While the Article refers to ultimate donors to political campaigns, HB 1521 applies the concept to sources of money for lobbying efforts. While that is useful information for citizens, it does not implement Article XIV. In fact, there is nothing in HB 1521 which implements §1 of Article XIV.

We hope that our comments are useful as the House and Senate work to implement Article XIV.

Sincerely yours,



Shruti Shah
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