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North Dakota Ethics Commission  
Attn: Hon. Ronald Goodman, Chair  
101 Slate Dr., Suite 4  
Bismarck, ND 58503  
*ethicscommission@nd.gov*

RE: Greater North Dakota Chamber Written Comments to Proposed Conflict of Interest Rules 115-04-01

Dear Chair Goodman:

I am writing on behalf of the Greater North Dakota Chamber of Commerce (“GNDC”) as to the draft rules for Article 115-04-01—Conflict of Interest. GNDC submits these comments informally with the understanding the Commission will be moving to formally adopt the rules pursuant to N.D.C.C. Ch. 28-32 at a later date. GNDC appreciates the Commission’s work on the current version of the draft rules. GNDC provides comments on the proposed rules as to two areas:

- 1) The potential impact of receipt of campaign contributions from an authorized PAC to a Public Official; and
  - 2) Simplification of the Neutral Reviewer process.
- The Commission should make it clear that a lawful campaign contribution from a PAC does not create a conflict of interest.

The Commission should state clearly that lawful campaign contributions to a Public Official by an authorized political action committee (“PAC”) do not require the Public Official to recuse or abstain from action on a matter where a PAC is not a party to the matter. While it is very unlikely that a PAC would be a “party” involving a matter or issue, it is plausible that a PAC would make lawful campaign contributions to a Public Official who makes decisions related to areas a PAC is concerned about. GNDC interprets the rules as drafted as not requiring a Public Official to recuse or abstain from a decision where a non-party PAC has made a lawful campaign contribution involving a matter in which a PAC is concerned about. But this is an interpretation—without legal weight. And even if this interpretation is shared by the Commission today, it could be interpreted differently one year, five years, ten years from today.

Under the draft rules, “[w]hen a matter comes before a Public Official and the Public Official has a known Potential Conflict of Interest, the Public Official must disclose the Potential Conflict of Interest” and “the Public Official may voluntarily recuse [themselves] and abstain from further action in the matter.” Draft Rule, 115-04-01-02(2) & (5). The draft rules define Potential Conflict of Interest to mean:

[A] Public Official as part of the Public Official’s duties must make a decision or take action in a matter in which the Public Official has:

- a) Received a Gift from one of the parties;
- b) A Significant Financial Interest in one of the parties or in the outcome of the proceeding; or
- c) A Relationship in Private Capacity with one of the parties.

Draft Rule 115-04-01-01(2). The rule creates uncertainty for PACs and Public Officials receiving PAC campaign contributions.

The “from one of the parties” language is helpful. But it can be interpreted different ways. In the non-quasi-judicial setting, who is a party? Because there is no formal proceeding with formal parties named, it is more nebulous in the general conflict of interest framework. Could a PAC be a party in a non-quasi-judicial proceeding? One interpretation is that it could be. And one could argue it is not a party. “Gift” is referenced in sub-provision (a) and is further defined in statute to *except* a campaign contribution. There is less cause for concern as to sub-provision (a) because any PAC contribution would be for a campaign and would not be a “Gift.” In sub-provision (b), “Significant Financial Interest” is included; the rules later define this as “a direct and substantial in-kind or monetary interest, or its equivalent, not shared by the general public, however, *does not include* investments in a widely held investment fund, such as mutual funds, exchange-traded funds, participation in a public employee benefits plan, or *lawful campaign contributions.*” Draft Rule 115-04-01-01(8) (emphasis added). One interpretation of this definition is that if a PAC were to make a lawful campaign contribution to a Public Official, then sub-provision (b) would not apply because a “Significant Financial Interest,” as defined, *excepts* any lawful campaign contributions. But this, again, is an interpretation only. Clarity and certainty should be the goal for the rules. Sub-provision (c) is more clear and unlikely to be an issue.

The Commission should adopt rules to provide certainty on this issue—that the rules would not require recusal or abstention. The effect of a “gray area” in the rules will cause uncertainty for PACs, Public Officials, and the public. The Commission has the opportunity now to clarify this “gray area” by including specific language to make it clear a lawful campaign contribution from a PAC to a Public Official does not require the Public Official to recuse, or abstain, from a matter before the Public Official in a matter where the PAC has concerns.

- The “Neutral Reviewer” definition should be simplified.

The Draft Rule defines “Neutral Reviewer” at 115-04-01-01(5) and further outlines a complicated process at 115-04-01-03. The definition and process should be simplified as follows:

“Neutral Reviewer” means the individual or committee designated by an agency, legislative body, board, commission, or committee to receive disclosures of Potential Conflicts of Interest and determine whether the Potential Conflict of Interest is a Disqualifying Conflict of Interest. In the absence of a rule or policy designating a Neutral Reviewer, the following shall apply: the director, officer, commissioner, head, or other executive shall make the determination but must report the disclosure and decision in the manner set forth in 115-05-01-06(2) within seven calendar days.

Doing so allows for development of a rule or policy by the agency, legislative body, board, commission, or committee, but reduces the potential for confusion.

Thank you.

Sincerely,

PEARCE DURICK PLLC

*/s/ Zachary E. Pelham*

ZACHARY E. PELHAM