

Draft Ethics Commission Rules Regarding Informal Guidance

Definitions.

1. “Enforcement action” means an investigation and proceeding before the commission pursuant to section 3 of article XIV of the Constitution of North Dakota regarding an alleged violation by a regulated individual.
2. “Ethical violation” means a violation of article XIV of the Constitution of North Dakota, North Dakota Century Code chapter 54-66, or another law or rule regarding transparency, corruption, elections, or lobbying by a regulated individual.
3. “Regulated individual” means a lobbyist, public official, candidate for public office, political committee, or contributor.

Informal guidance.

1. The executive director with assistance from commission staff may provide written informal guidance to a regulated individual regarding the application of the following to specific hypothetical facts or prospective conduct:
 - a. Article XIV of the Constitution of North Dakota; or
 - b. State statutes and ethics commission rules related to transparency, corruption, elections, and lobbying.
2. A request for informal guidance must be made in writing and should include a detailed description of the factual situation, relevant parties, and the specific issue or question for which informal guidance is sought.
3. A regulated individual may only request informal guidance related to hypothetical facts or prospective conduct of the individual who makes the request. Another individual, board, entity, or organization may make a request on behalf of a regulated individual with corroborating evidence demonstrating the request is authorized and done on behalf of the regulated individual.

Guidance letter related to enforcement action.

1. The commission may analyze the facts of an enforcement action and provide a guidance letter to a regulated individual for educational and future reference purposes regarding application of the following:
 - a. Article XIV of the Constitution of North Dakota; or
 - b. State statutes and ethics commission rules related to transparency, corruption, elections, and lobbying.
2. A guidance letter may be issued to settle an enforcement action or with a commission order finding an ethical violation.

Commission review.

The executive director shall provide the written informal guidance to the commission forty-eight hours prior to providing a copy to the regulated individual. Should a commissioner disagree with

the written informal guidance, the commissioner shall notify the chair of the commission. The chair may call a special meeting for the commission to discuss the written informal guidance. If no disagreement is raised within the forty-eight-hour period, the informal guidance shall be considered approved by the commission.

Defense during enforcement action.

1. Any informal guidance or guidance letter advising certain conduct is or was permissible shall, until amended or revoked, be binding upon the commission in any subsequent enforcement action concerning the regulated individual who requested the guidance and acted in reliance on it in good faith, unless material facts were omitted or misstated by the regulated individual.
2. If the commission determines an individual acted on informal guidance in good faith, it shall close any enforcement action arising from the same facts presented in the request for informal guidance.

No formation of attorney-client relationship and disclaimer.

Nothing in these rules shall establish an attorney-client relationship between a regulated individual and the commission, the executive director, or commission staff. Any informal guidance or guidance letter issued by the commission or the executive director shall include a disclaimer. The disclaimer must describe the following:

1. The informal guidance is the position of the commission;
2. The commission, the executive director, and commission staff are not the regulated individual's attorney;
3. By providing informal guidance or a guidance letter no attorney-client relationship is formed between a regulated individual and the commission, the executive director, or commission staff;
4. The informal guidance provides a defense only in an enforcement action before the commission when relied on in good faith; and
5. If the regulated individual would like further protection from civil and/or criminal liability, the regulated individual should consider requesting an advisory opinion from the commission.