

ETHICS COMMISSION AND LEGISLATIVE ASSEMBLY RESPONSIBILITIES - BACKGROUND MEMORANDUM

Senate Bill No. 2148 (2019) ([Appendix A](#)) directs the Legislative Management to study the implementation and requirements of Article XIV of the Constitution of North Dakota concerning the transparency of funding sources, lobbyists, conflicts of interest, and related matters, the responsibilities of the Legislative Assembly and the North Dakota Ethics Commission, and potential issues under the Constitution of the United States and the Constitution of North Dakota. The study must include a review of existing laws and laws enacted to implement Article XIV; consideration of whether the civil and criminal sanctions for violations of the constitutional provisions and the statutes being studied are appropriate and whether additional legislative action regarding Article XIV is necessary or desirable; and deliberations regarding an effective means to educate public officials, lobbyists, and the public on the requirements of Article XIV and other laws regarding government ethics. Members of the Ethics Commission created by Article XIV must be invited to participate on the study committee as nonvoting members.

BACKGROUND

In the November 2018 general election, voters approved a ballot measure ([Appendix B](#)) creating Article XIV of the Constitution of North Dakota ([Appendix C](#)). Article XIV contains several provisions related to government ethics applicable to lobbyists, legislators, other elected and appointed state officials, members of the Governor's cabinet, and employees of the legislative branch. Although Article XIV generally became effective on January 5, 2019, several of the sections in the article have delayed effective dates. Some provisions in the article require the Legislative Assembly to enact laws, and many of the provisions in the article existed in statute before Article XIV was created. The Legislative Assembly passed House Bill No. 1521 (2019) ([Appendix D](#)) to implement parts of Article XIV. On August 8, 2019, the members of the Ethics Commission were selected.

ARTICLE XIV OF THE CONSTITUTION OF NORTH DAKOTA

Article XIV adds provisions regarding transparency, corruption, elections, and lobbying to the Constitution of North Dakota, although many of the article's mandates were included in the North Dakota Century Code before Article XIV was approved by voters. Specifically, Article XIV:

1. Requires the Legislative Assembly to enact laws regarding transparency of funds used for certain political purposes;
2. Prohibits any gift from a lobbyist to a public official;
3. Prohibits a public official from being a lobbyist while holding office and for 2 years after holding office;
4. Prohibits a lobbyist from knowingly delivering a campaign contribution made by another person;
5. Prohibits a public official or candidate for statewide or legislative office from using a campaign contribution for personal use;
6. Requires certain state employees and officials to avoid the appearance of bias;
7. Prohibits a foreign national not lawfully admitted for permanent residence in the United States, a foreign government, and a foreign corporation from making contributions or expenditures for statewide or legislative campaigns;
8. Creates a state ethics commission with broad authority to adopt rules related to transparency, corruption, elections, and lobbying, and to make the rules apply to lobbyists, public officials, and candidates for public office; and
9. Requires the Legislative Assembly to appropriate funds for a state ethics commission.

The Ethics Commission created by Article XIV is not part of the executive, legislative, or judicial branch of state government. The five members of the commission are to be appointed unanimously by the Governor, Majority Leader of the Senate, and Minority Leader of the Senate. The members may not hold public office, or be lobbyists, candidates for public office, or political party officials. Article XIV gives the commission authority "to investigate alleged violations of [the commission's] rules, [Article XIV], and related state laws" and mandates the commission maintain a confidential hotline to receive information from any "person acting in good faith." Article XIV also requires the Legislative Assembly to appropriate adequate funds for the commission to carry out its responsibilities.

HOUSE BILL NO. 1521

During the 2019 legislative session, an ethics committee in each chamber of the Legislative Assembly was created and tasked with developing legislation to implement Article XIV. The Senate Ethics Committee was

assigned Senate Bill No. 2148, which originally contained provisions to implement Article XIV but was amended to require this study. The House Ethics Committee was assigned House Bill No. 1521, which was passed by both chambers after several hearings and amendments.

House Bill No. 1521 included 28 sections that fall into four broad categories. The first five sections of the bill amended sections of North Dakota Century Code Chapter 16.1-08.1, which regulates campaign finance. These bill sections implemented Section 1 of Article XIV regarding transparency of campaign contributions and expenditures, and provided a penalty for violations of subsection 4 of Section 2 of Article XIV, which prohibits the personal use of campaign contributions. Sections 6 through 24 of House Bill No. 1521 amended Chapter 28-32 and requires the Ethics Commission created by Article XIV to follow many of the procedures for adopting rules that executive branch agencies are required to follow. Section 25 of House Bill No. 1521 created Chapter 54-66, which implements multiple parts of Article XIV and establishes procedures and requirements for the Ethics Commission. The chapter also authorizes civil penalties for violations of Article XIV provisions, and gives the Secretary of State and Ethics Commission authority to enforce certain ethics laws. The remaining three sections appropriated funds to the Ethics Commission, authorized the commission to hire 2 full-time equivalent positions, and provided effective dates for other sections of the bill.

Changes to Campaign Finance Requirements

Subsection 3 of Section 1 of Article XIV requires the "prompt, electronically accessible, plainly comprehensible, public disclosure of the ultimate and true source of funds spent in any medium, in an amount greater than two hundred dollars, adjusted for inflation, to influence any statewide election, election for the legislative assembly, statewide ballot-issue election, or to lobby or otherwise influence state government action." (emphasis added) Before the adoption of Article XIV; however, state statutes already required campaign finance reports, which are available to the public on the Secretary of State's website. Chapter 16.1-08.1, which predates Article XIV, required several types of candidates and organizations to report contributions and expenditures of \$200 or more (\$100 or more for certain organizations involved in activities regarding a ballot measure) and other information to the Secretary of State. Chapter 16.1-08.1 also did not include any provision to adjust the \$100 and \$200 reporting thresholds for inflation.

To reflect the language in Article XIV, Sections 1, 2, 4, and 5 of House Bill No. 1521 defined "ultimate and true source," required campaign finance reports to identify the ultimate and true source of funds, and required the Secretary of State to make adjustments to the reporting thresholds for inflation. Section 5 of the bill also stated a resident taxpayer may commence an action in district court to compel compliance with the section if all other enforcement measures under Chapter 16.1-08.1 have been exhausted and the taxpayer reasonably believes there is a failure to comply. This provision stems from subsection 2 of Section 1 of Article XIV, which states "[i]f the laws or rules enacted or an implementation, interpretation, or enforcement action taken under this section fail [sic] to fully vindicate the rights provided in this section, a resident taxpayer may bring suit in the courts of this state to enforce such rights."

Additionally, subsection 4 of Section 2 of Article XIV prohibits the personal use of campaign contributions. Section 16.1-08.1-04.1, which predates Article XIV, prohibits the use of campaign contributions for personal benefit. Before the effective date of House Bill No. 1521, a willful violation of Section 16.1-08.1-04.1 was a Class A misdemeanor under Section 16.1-08.1-07. House Bill No. 1521 amended Section 16.1-08.1-04.1 to authorize the Secretary of State to assess a civil penalty upon any person that knowingly violates the section. The civil penalty may be no less than two times the amount of the contribution used in violation of the law.

Rulemaking Authority of the Ethics Commission

Subsection 1 of Section 3 of Article XIV created the Ethics Commission, and several provisions in Article XIV grant the commission rulemaking authority. Although the Ethics Commission is not an executive branch agency, it is subject to due process requirements applicable to rulemaking. Article XIV does not provide a process for the commission to follow when making rules. House Bill No. 1521 requires the Ethics Commission to comply with some of the rulemaking procedures in Chapter 28-32, which also is known as the Administrative Agencies Practice Act. Under the bill, commission rules do not have to be reviewed by the Attorney General or by the Legislative Management's Administrative Rules Committee.

Ethics Commission Procedures

Section 25 of House Bill No. 1521, codified as Chapter 54-66, provided several procedures and requirements for the Ethics Commission created by Article XIV. For example, the section included procedures for receiving, resolving, and investigating complaints; determining whether violations occurred; and appealing penalties. The section also identified which information possessed by the Ethics Commission is confidential and includes logistical requirements for staggering commission members' terms, compensating commission members, requiring the

members to adopt a code of ethics to which they must adhere, and removing members from the commission for cause. The section also requires the Attorney General to provide legal services to the commission except in specific matters when the commission members object to the representation.

Appropriations, Effective Dates, and Other Provisions

House Bill No. 1521 included several miscellaneous provisions, including an appropriation of \$517,155 to the ethics commission and effective dates for multiple sections of the bill. The bill also established penalties for several violations of Century Code and Article XIV, as required by Article XIV. The bill also restated several parts of Article XIV such as the restriction on lobbying by public officials, the prohibition against lobbyists delivering campaign contributions, and the prohibition against lobbyists' gifts to public officials. It also provided clarification regarding the conflict of interest provisions in subsection 5 of Section 2 of Article XIV.

SUGGESTED STUDY APPROACH

To become familiar with relevant ethics-related laws, the committee members may wish to review Article XIV, Chapter 16.1-08.1, House Bill No. 1521, and the Legislative Council memoranda entitled [Comparison of Constitutional Amendment on Ethics and Relevant Sections of the Constitution of North Dakota and North Dakota Century Code](#) and [Summary of House Bill No. 1521 \(2019\) - Government Ethics](#). Additionally, the committee will need to identify and evaluate the appropriateness of the penalties provided for violations of Article XIV, Chapters 16.1-08.1 and 54-66, and other relevant laws.

The committee may wish to request testimony from members of the Ethics Commission regarding the commission's activities.

The committee may wish to invite public or private entities engaged in public awareness campaigns to provide testimony on methods of educating public officials, lobbyists, and the public on new ethics requirements. The committee may wish to consider which means are most effective for conveying the relevant information, how much an education campaign will cost, and which persons will need to be reached by the campaign. The committee may wish to consider whether posting information on a state website would be sufficient to educate stakeholders. The committee also may request testimony from the North Dakota Lobbyist Association regarding the best methods to educate its members.

ATTACH:4