

2023 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1485

2023 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1485
2/1/2023

Relating to the rulemaking process of the ethics commission.

Chairman Louser called to order 9:42 AM

Members Present: Chairman Louser, Vice Chairman Ostlie, Representatives Boschee, Christy, Dakane, Johnson, Kasper, Koppelman, Ruby, Schauer, Thomas, Tveit, Wagner, Warrey.

Discussion Topics:

- Conflicts of interest
- Interpretive opinions
- Rules on ethics
- Obligation to vote
- Constitutional authority
- Spirit of the law
- Harmonize the rules.
- Audio/video disclosure

In favor:

Representative Jim Kasper, District 46, Primary bill sponsor, #18524

Opposed:

Rebecca Binstock, Executive Director, ND Ethics Commission, #18288

Chairman Louser adjourned the meeting 10:58 AM

Diane Lillis, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1485
2/20/2023

Relating to the rulemaking process of the ethics commission.

Chairman Louser called the meeting to order 10:55 AM

Members Present: Chairman Louser, Vice Chairman Ostlie, Representatives Boschee, Christy, Dakane, Johnson, Kasper, Koppelman, Ruby, Schauer, Thomas, Tveit, Warrey, Wagner.

Discussion Topics:

- Advisory opinion
- House and Senate rules
- Safe harbor provision
- IT tab

John Bjornson, Director of North Dakota Legislative Council testified in a neutral position (no written testimony).

Rebecca Binstock, Executive Director of the ND Ethics Commission (no written testimony)

Representative Koppelman moved to adopt, # 21170, LC #23.0808.01005.
Representative Thomas seconded.

Roll call vote:

Representatives	Vote
Representative Scott Louser	Y
Representative Mitch Ostlie	Y
Representative Josh Boschee	Y
Representative Josh Christy	Y
Representative Hamida Dakane	Y
Representative Jorin Johnson	Y
Representative Jim Kasper	Y
Representative Ben Koppelman	Y
Representative Dan Ruby	Y
Representative Austen Schauer	Y
Representative Paul J. Thomas	Y
Representative Bill Tveit	Y
Representative Scott Wagner	Y
Representative Jonathan Warrey	Y

Motion passed 14-0-0

Representative Koppelman moved do pass as amended.
Representative Thomas seconded.

Roll call vote:

Representatives	Vote
Representative Scott Louser	Y
Representative Mitch Ostlie	Y
Representative Josh Boschee	Y
Representative Josh Christy	Y
Representative Hamida Dakane	Y
Representative Jorin Johnson	Y
Representative Jim Kasper	Y
Representative Ben Koppelman	Y
Representative Dan Ruby	Y
Representative Austen Schauer	Y
Representative Paul J. Thomas	Y
Representative Bill Tveit	Y
Representative Scott Wagner	Y
Representative Jonathan Warrey	Y

Motion passed 14-0-0

Representative Kasper will carry the bill.

Chairman Louser adjourned the meeting 11:35 AM

Diane Lillis, Committee Clerk

February 20, 2023

24
2-20-23

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1485

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 54-66 of the North Dakota Century Code, relating to legislative assembly conflict of interest rules; to provide for application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 54-66 of the North Dakota Century Code is created and enacted as follows:

Conflicts of interest - Legislative assembly.

1. Each legislative assembly shall adopt conflict of interest rules. The rules must:
 - a. Require the disclosure by a member of a potential conflict of interest relating to any bill in which the member may have a direct, unique, substantial, or individual interest.
 - b. Ensure a mechanism is in place to record each disclosure and make it readily available to the public.
2. If the legislative assembly adopts rules under subsection 1 which are at least as restrictive as the conflict of interest rules adopted by the ethics commission, the disclosure process portion of the conflict of interest rules adopted by the ethics commission may not apply to members of the legislative assembly.

SECTION 2. APPLICATION. House Rule 321, Senate Rule 321, and associated rules relating to conflicts of interest of legislators, as enacted by the sixty-eighth legislative assembly, are at least as restrictive as the conflict of interest rules adopted by the ethics commission and control conflict of interest disclosure for members of the legislative assembly.

SECTION 3. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

REPORT OF STANDING COMMITTEE

HB 1485: Industry, Business and Labor Committee (Rep. Louser, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1485 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 54-66 of the North Dakota Century Code, relating to legislative assembly conflict of interest rules; to provide for application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 54-66 of the North Dakota Century Code is created and enacted as follows:

Conflicts of interest - Legislative assembly.

1. Each legislative assembly shall adopt conflict of interest rules. The rules must:
 - a. Require the disclosure by a member of a potential conflict of interest relating to any bill in which the member may have a direct, unique, substantial, or individual interest.
 - b. Ensure a mechanism is in place to record each disclosure and make it readily available to the public.
2. If the legislative assembly adopts rules under subsection 1 which are at least as restrictive as the conflict of interest rules adopted by the ethics commission, the disclosure process portion of the conflict of interest rules adopted by the ethics commission may not apply to members of the legislative assembly.

SECTION 2. APPLICATION. House Rule 321, Senate Rule 321, and associated rules relating to conflicts of interest of legislators, as enacted by the sixty-eighth legislative assembly, are at least as restrictive as the conflict of interest rules adopted by the ethics commission and control conflict of interest disclosure for members of the legislative assembly.

SECTION 3. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

2023 SENATE STATE AND LOCAL GOVERNMENT

HB 1485

2023 SENATE STANDING COMMITTEE MINUTES

State and Local Government Committee
Room JW216, State Capitol

HB 1485
3/23/2023

Relating to legislative assembly conflict of interest rules; provide for application; declare an emergency.

9:00 AM Chair Roers opened the hearing. Present: Chair Roers, Vice Chair Barta, Sen Cleary, Sen Estenson, Sen J Lee, and Sen Braunberger.

Discussion Topics:

- Tradition
- Rule 321
- Ethics commission

Rep Kasper, Dist 46, bill sponsor, testified in support with no written testimony.

Rebecca Binstock, ND Ethics Commission testified neutral #26351.

Additional written testimony:

Jim Kasper #26429

Sen Estenson moved a DO PASS.

Sen Beaunberger seconded the motion.

Senators	Vote
Senator Kristin Roers	Y
Senator Jeff Barta	Y
Senator Ryan Braunberger	Y
Senator Sean Cleary	Y
Senator Judy Estenson	Y
Senator Judy Lee	Y

VOTE: YES – 6 NO – 0 Absent - 0 Motion Passed

Sen Estenson will carry the bill.

9:11 AM Chair Roers closed the hearing.

Pam Dever, Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1485, as engrossed: State and Local Government Committee (Sen. K. Roers, Chairman) recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1485 was placed on the Fourteenth order on the calendar. This bill does not affect workforce development.

TESTIMONY

HB 1485



North Dakota Ethics Commission
House Bill 1485
Testimony presented by
Rebecca Binstock, Executive Director
Before the House Industry, Business, and Labor Committee
February 1, 2023

AGENCY HISTORY

Good morning, Mr. Chairman and Committee members, my name is Rebecca Binstock. I serve as the Executive Director of the North Dakota Ethics Commission and I am here today to testify in opposition to HB 1485.

The Commission consists of five Commissioners who were appointed September 1, 2019:

- Chair Paul Richard (Fargo)
- Vice-Chair David Anderson (Bismarck)
- Ron Goodman (Oakes)
- Ward Koeser (Williston)
- Dr. Cynthia Lindquist (St. Michael)

The North Dakota Ethics Commission was created in 2018 by passage of an initiated measure which created Article XIV of the North Dakota Constitution. The Commission is governed by Article XIV of the North Dakota Constitution and North Dakota Century Code Chapter 54-66.

Since its inception, the Commission has adopted complaint rules, gift rules, quasi-judicial proceeding rules, and conflict of interest rules within the timelines outlined by Article XIV of the Constitution. The Commission continues to adopt rules to address transparency, corruption, elections, and lobbying as authorized by the Article XIV of the Constitution.

HB 1485

SECTION 1 amends N.D.C.C. § 28-32-08.1(5). Currently, subsection (5) states section 28-32-08.1 does not apply to the ethics commission. Section 1 of HB 1485 removes the language that states section 28-32-08.1 does not apply to the ethics commission. The ethics commission believes the intent of the amendment is to make the ethics commission subject to the subsection (5) of 28-32-08.1 and require the ethics commission to complete an economic impact statement prior to adopting rules.

Historically, the ethics commission has not been included as an agency required to complete economic impact statements because its rules do not affect small entities (small businesses, small organizations, and small political subdivisions). Rules adopted pursuant to the ethics commission's constitutional authority over transparency, corruption, elections, and lobbying do not impact small entities; therefore, the ethics commission was specifically excluded from completing economic impact statements.

While the ethics commission would be amenable to complete an economic impact statement prior to adopting rules, the commission believes the law as currently enacted is reasonable given the scope of the ethics commission's authority. Consequently, the ethics commission opposes Section 1 of HB 1485.

SECTION 2 amends N.D.C.C. § 54-66-11 to make the ethics commission "subject to" the administrative agencies practice act. Currently, section 54-66-11 requires the ethics commission to follow the portions of the administrative agencies practice act which specifically apply to the ethics commission. For instance, the ethics commission is subject to the regulatory analysis requirement; fiscal impact statement requirement; takings assessment requirement; and hearing, notice, comment, and publication requirements when adopting rules. The portions of the administrative agencies practice act which specifically apply to the ethics commission include language referencing the ethics commission – typically a rule that applies to administrative agencies and the commission includes both the terms "agency" and "commission."

The ethics commission believes the intent of HB 1485 is to require the ethics commission to comply with the entirety of the administrative agencies practice act, instead of the sections which are specifically applicable to the ethics commission.

In 2019, a similar proposition was considered and rejected because the ethics commission is not an administrative agency. The ethics commission's rulemaking and oversight

authority are constitutional and are derived from Article XIV of the North Dakota Constitution. This is distinctly different from the source of authority for administrative agencies, which is delegated to agencies by the legislative assembly.

Under current law, the portions of the administrative agencies practice act which are not applicable to the ethics commission, including review of its proposed rules by the attorney general and the legislative management's administrative rules committee before final adoption, is because the legislature does not delegate rule-making authority to ethics commission in the way it delegates authority to administrative agencies. Application of these rules to the ethics commission would create an inherent conflict of interest as the ethics commission has constitutional oversight authority over the attorney general and members of the legislative assembly. Therefore, the ethics commission opposes Section 2 of HB 1485.

SECTION 3 adds a new section to chapter 54-66 of the North Dakota Century Code. This section creates a limitation on the ethics commission's constitutional authority.

The ethics commission has no concerns as to subsection 1 (pg. 2, lines 13-19), as this subsection summarizes language of Article XIV of the Constitution of North Dakota. However, the ethics commission opposes subsections 2 and 3, specifically inclusion of the sentence which states: "This section does not include the authority to adopt rules imposing regulations related to conflicts of interest."

The ethics commission opposes the language because Article XIV of the Constitution instructs that the legislature may not be enact laws "to hamper, restrict, or impair" Article XIV. See N.D. Const. Art. XIV, § 4(1). HB 1485 directly restricts Article XIV as it carves out conflicts of interest rules from the scope of Article XIV.

Additionally, the last sentence of subsection 2 as well as subsection 3 are in direct conflict with the ethics commission's adoption of conflict of interest rules. The ethics commission has determined rules which provide guidance on how to address conflicts of interest inherently relate to transparency and corruption. In 2022, after a notice, hearing, and comment period, the ethics commission adopted conflict of interest rules for public officials. Subsections 2 and 3 of HB 1485 conflict with the conflict of interest rules promulgated by the ethics commission. Both the Attorney General and the North Dakota Supreme Court have determined that rules promulgated pursuant to constitutional authority prevail when in conflict with a legislatively-enacted rule. See Letter Opinion 2020-L-09, pp. (December 23, 2020) and City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992). Thus, the ethics commission opposes Section 3 of HB 1485.

The North Dakota Ethics Commission urges this Committee reject HB 1485 with a do not pass recommendation.

Mr. Chairman, that concludes my testimony and I will gladly stand for any questions you may have.

ARTICLE XIV ETHICS COMMISSION

Section 1.

1. The people of North Dakota need information to choose candidates for office, vote on ballot measures, and ensure that their representatives are accountable. This transparency must be sufficient to enable the people to make informed decisions and give proper weight to different speakers and messages. The people therefore have the right to know in a timely manner the source, quantity, timing, and nature of resources used to influence any statewide election, election for the legislative assembly, statewide ballot-issue election, and state government action. This right is essential to the rights of free speech, assembly, and petition guaranteed by the First Amendment to the Constitution of the United States and shall be construed broadly.
2. The legislative assembly shall implement and enforce this section by enacting, no more than three years after the effective date of this article, laws that require 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. The legislative assembly shall have an ongoing duty to revise these laws as necessary to promote the purposes of this section in light of changes in technology and political practices. The legislative assembly shall vest by law one or more entities with authority to implement, interpret, and enforce this section and legislation enacted thereunder. If the laws or rules enacted or an implementation, interpretation, or enforcement action taken under this section fail 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.

Section 2.

1. A lobbyist may not knowingly give, offer, solicit, initiate, or facilitate a gift to a public official. A public official may not knowingly accept a gift from a lobbyist. These prohibitions do not apply if the lobbyist is an immediate family member of the public official. "Gift," as used in this subsection, means any item, service, or thing of value not given in exchange for fair market consideration, including gifts of travel or recreation. However, "gift" does not mean any purely informational material, campaign contribution, or, in order to advance opportunities for North Dakota residents to meet with public officials in educational and social settings inside the state, any item, service, or thing of value given under conditions that do not raise ethical concerns, as determined by rules adopted by the ethics commission. Such rules must be adopted within two years after the effective date of this article. So as to allow for the adoption of these rules, these prohibitions shall take effect two years after the effective date of this article. Appropriate civil and criminal sanctions for violations of this subsection shall be set by the legislative assembly.
2. An elected public official may not be a lobbyist while holding office or for two years after holding office. Appropriate civil and criminal sanctions for violations of this subsection shall be set by the legislative assembly.
3. A lobbyist may not knowingly deliver a campaign contribution made by another individual or entity. "Deliver," as used in this subsection, means to transport, transfer, or otherwise transmit, either physically or electronically. This prohibition does not apply to a person who delivers a campaign contribution to the person's own campaign, or to the campaign of the person's immediate family member. This prohibition shall not be interpreted to prohibit any person from making a campaign

- contribution or from encouraging others to make a campaign contribution or to otherwise support or oppose a candidate. Appropriate civil and criminal sanctions for violations of this subsection shall be set by the legislative assembly.
4. A statewide candidate, candidate for the legislative assembly, or public official may not knowingly use a campaign contribution for personal use or enrichment. Appropriate civil and criminal sanctions for violations of this subsection shall be set by the legislative assembly.
 5. Directors, officers, commissioners, heads, or other executives of agencies shall avoid the appearance of bias, and shall disqualify themselves in any quasi-judicial proceeding in which monetary or in-kind support related to that person's election to any office, or a financial interest not shared by the general public as defined by the ethics commission, creates an appearance of bias to a reasonable person. The legislative assembly and the ethics commission shall enforce this provision by appropriate legislation and rules, respectively. So as to allow for the adoption of such legislation or rules, this subsection shall take effect three years after the effective date of this article.
 6. Governments of foreign countries, foreign nationals not lawfully admitted for permanent residence in the United States, and corporations organized under the laws of or having their principal place of business in a foreign country, are prohibited from making contributions or expenditures in connection with any statewide election, election for the legislative assembly, or statewide ballot-issue election.

Section 3.

1. In order to strengthen the confidence of the people of North Dakota in their government, and to support open, ethical, and accountable government, the North Dakota ethics commission is hereby established.
2. The ethics commission may adopt ethics rules related to transparency, corruption, elections, and lobbying to which any lobbyist, public official, or candidate for public office shall be subject, and may investigate alleged violations of such rules, this article, and related state laws. The ethics commission shall maintain a confidential whistleblower hotline through which any person acting in good faith may submit relevant information. The legislative assembly shall provide adequate funds for the proper carrying out of the functions and duties of the commission.
3. The ethics commission shall consist of five members, appointed for four-year terms by consensus agreement of the governor, the majority leader of the senate, and the minority leader of the senate. No member of the ethics commission may hold other public office or be a lobbyist, candidate for public office, or political party official.

Section 4.

1. This article is self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate, safeguard, or expand, but not to hamper, restrict, or impair, this article. This article shall take effect sixty days after approval.
2. For the purposes of this article, "public office" or "public official" means any elected or appointed office or official of the state's executive or legislative branch, including members of the ethics commission, or members of the governor's cabinet, or employees of the legislative branch, and "agency" means each board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency.
3. If any provision of this article is held to be invalid, either on its face or as applied to any person, entity, or circumstance, the remaining provisions, and the application thereof to any person, entity, or circumstance other than those to which it is held invalid, shall not be affected thereby. In any case of a conflict between any provision

of this article and any other provision contained in this constitution, the provisions of this article shall control.

**ARTICLE 115-04
CONFLICT OF INTEREST**

Chapter
115-04-01 Conflict of Interest

**CHAPTER 115-04-01
CONFLICT OF INTEREST**

Section
115-04-01-01 Definitions
115-04-01-02 Disclosure of Potential Conflict of Interests
115-04-01-03 Neutral Reviewer Evaluation of Potential Conflict Disclosures, Decision, and Action
115-04-01-04 Disclosure Form and Documentation
115-04-01-05 Adoption of More Restrictive Rules

115-04-01-01. Definitions.

1. "Disqualifying conflict of interest" means one of the following:
 - a. A potential conflict of Interest disclosed pursuant to this rule which the public official has determined requires recusal and abstention from further action in the matter; or
 - b. A potential conflict of Interest disclosed pursuant to this rule which the neutral reviewer has determined requires the public official to recuse and abstain from further action in the matter.
2. "Potential conflict of interest" means 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.
3. "Gift" means a gift not otherwise permitted under article XIV of the Constitution of North Dakota, North Dakota Century Code chapter 54-66, or North Dakota Administrative Code chapter 115-03-01.
4. "Immediate family" means a public official's parent, sibling, spouse, grandparent, grandchild, stepchild, or child by blood or adoption.
5. "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:
 - a. If a public official with a potential conflict of interest is a member of a legislative body, board, commission, or committee the remaining individuals who are members of the legislative body, board, commission, or committee shall be considered as the neutral reviewer;
 - b. If a public official with a potential conflict of interest is an employee of the legislature, the public official's supervisor may be considered as the neutral reviewer;

- c. If a public official with a potential conflict of interest is a member of the governor's cabinet, the governor's designated ethics officer shall be considered as the neutral reviewer;
 - d. If the public official with a potential conflict of interest is an appointed public official, the appointing official shall be considered as the neutral reviewer; or
 - e. If none of the above apply, the public official shall make the determination but must report the disclosure and decision in the manner set forth in section 115-04-01-04 within seven calendar days.
6. "Public official" means any elected or appointed official of the North Dakota executive or legislative branches, including members of the ethics commission, members of the governor's cabinet, and employees of the legislative branch.
 7. "Relationship in a private capacity" means a past or present commitment, interest or relationship of the public official in a matter involving the public official's immediate family, individual's residing in the public official's household, the public official's employer, or employer of the public official's immediate family, or individuals with whom the public official has a substantial and continuous business relationship.
 8. "Significant financial interest" means 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.

History: Effective October 19, 2022.

115-04-01-02. Disclosure of potential conflict of interests.

1. Subject to the requirements of section 115-04-01-05, this section shall only apply if an agency, board, or commission does not have a current conflicts of interest statute or rule. In any assessment of a possible conflict of interest the matter will be reported to the ethics commission in accordance with section 115-04-01-04.
2. When 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.
3. The disclosure of potential conflict of interest must be made prior to the public official taking any action or making any decision in the matter and must provide sufficient information concerning the matter and the public official's potential conflict of interest. Disclosure shall be on the written form approved by the ethics commission as set forth in section 115-04-01-04.
4. In emergency or other exigent circumstances where time is of the essence, and a public official is not permitted or is otherwise unable to abstain from action in connection with the matter, the public official must disclose the potential conflict of interest and the action with the neutral reviewer in the manner requested by the neutral reviewer. The disclosure must occur within seven calendar days of the public official's action in the matter.
5. Upon the completion of the required disclosure of a potential conflict of interest, the public official may voluntarily recuse himself and abstain from further action in the matter.

History: Effective October 19, 2022.

115-04-01-03. Neutral reviewer evaluation of potential conflict disclosures, decision, and action.

1. Subject to section 115-04-01-05, this section shall only apply if an agency, board, or commission does not have a current conflict of interest statute or rule. In any assessment of a possible conflict of interest the matter will be reported to the ethics commission in accordance with section 115-04-01-04.
2. If a public official elects not to recuse themselves from the matter, the public official may consult with or defer to the neutral reviewer. The neutral reviewer, if utilized, shall evaluate the disclosure, may request further information from the public official regarding the disclosure, and shall determine if the disclosed potential conflict of interest constitutes a disqualifying conflict of interest.
3. Upon completion of the review of the potential conflict of interest, the neutral reviewer should communicate to the public official one of the following:
 - a. The potential conflict of interest does not constitute a disqualifying conflict of interest, and the public official may participate in the matter; or
 - b. The potential conflict of interest does constitute a disqualifying conflict of interest, and the public official shall recuse himself and abstain from participating in the matter.
4. A violation of article XIV of the Constitution of North Dakota or these rules will not be found if:
 - a. The public official consults with and adheres to the neutral reviewer's suggested course of action;
 - b. The public official acts in good faith; and
 - c. The disclosed material facts surrounding the potential conflict of interest are substantially the same as the facts presented in the complaint.
5. If applicable the neutral reviewer shall comply with the requirements of North Dakota Century Code chapter 44-04 in its consideration and review of the potential conflict of interest. During any discussion of a potential conflict of interest, upon request by the neutral reviewer, the public official may provide additional information regarding the potential conflict of interest and the matter in question. Where North Dakota Century Code chapter 44-04 applies, the public official may not be asked to leave the discussion of the potential conflict of interest; however, the disclosing public official may voluntarily leave the meeting at which the discussion occurs.
6. If the neutral reviewer is a group of individuals in which the public official is a member, the public official may not vote on the issue of whether a potential conflict of interest constitutes a disqualifying conflict of interest. The public official may not be counted for purposes of determining whether a quorum is present. Any quorum requirement established under statute or rule shall be reduced as though the public official were not a member of the group of individuals that constitutes the neutral reviewer.
7. The following standards shall guide the review and decision of either a public official or the neutral reviewer with respect to any public official's potential conflict of interest:
 - a. Appropriate weight and proper deference must be given to the requirement that a public official perform the duties of elected or appointed office, including the duty to vote or otherwise act upon a matter, provided the public official has properly disclosed the potential conflict of interest as required by this rule.

- b. A decision that requires a public official to recuse or abstain from further action or decision in a matter should only occur in cases where the independence of judgment of a reasonable person in the public official's situation would be materially affected by the disclosed potential conflict of interest.
- c. The review of a potential conflict of interest and any decision that would require a public official to recuse themselves or abstain from further involvement in a matter shall consider any applicable North Dakota law which precludes the public official from recusal or abstention in the matter.
- d. It is presumed that a public official does not have a disqualifying conflict of interest if the public official would not derive any personal benefit which is greater than that accruing to any other member of the general public or any general business, profession, occupation, or group affected by the matter.
- e. Any guidance issued by the ethics commission, including informal guidance, advisory opinions, rules, standards, and precedent.

History: Effective October 19, 2022.

115-04-01-04. Disclosure form and documentation.

1. Disclosure required under these rules shall be made using the form approved by the ethics commission and available on the ethics commission website. The form will allow public officials and directors, officers, commissioners, heads, or other executives of agencies to input information and attach relevant documentation.
2. The neutral reviewer or public official shall document the decision regarding any disclosures on the approved form. Upon completion, the neutral reviewer or public official shall provide a copy of the completed form to the relevant department, agency, board, body, commission, or committee, and the ethics commission. The public official may retain a copy of the completed form.
3. Departments, agencies, boards, commissions, or public entities shall document in the official minutes of a proceeding information, if applicable, that a public official or director, officer, commissioner, head, or other executive has been recused from any further involvement in the matter.

History: Effective October 19, 2022.

115-04-01-05. Adoption of more restrictive rules.

Any agency, office, commission, board, or entity subject to these rules may adopt conflict of interest rules that are more restrictive than these rules but may not adopt conflict of interest rules that are less restrictive.

History: Effective October 19, 2022.

23.0808.01005
Title.02000

Prepared by the Legislative Council staff for
House Industry, Business and Labor
Committee

February 20, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1485

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 54-66 of the North Dakota Century Code, relating to legislative assembly conflict of interest rules; to provide for application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 54-66 of the North Dakota Century Code is created and enacted as follows:

Conflicts of interest - Legislative assembly.

1. Each legislative assembly shall adopt conflict of interest rules. The rules must:
 - a. Require the disclosure by a member of a potential conflict of interest relating to any bill in which the member may have a direct, unique, substantial, or individual interest.
 - b. Ensure a mechanism is in place to record each disclosure and make it readily available to the public.
2. If the legislative assembly adopts rules under subsection 1 which are at least as restrictive as the conflict of interest rules adopted by the ethics commission, the disclosure process portion of the conflict of interest rules adopted by the ethics commission may not apply to members of the legislative assembly.

SECTION 2. APPLICATION. House Rule 321, Senate Rule 321, and associated rules relating to conflicts of interest of legislators, as enacted by the sixty-eighth legislative assembly, are at least as restrictive as the conflict of interest rules adopted by the ethics commission and control conflict of interest disclosure for members of the legislative assembly.

SECTION 3. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly



North Dakota Ethics Commission
House Bill 1485
Testimony presented by
Rebecca Binstock, Executive Director
Before the Senate State and Local Government Committee
March 23, 2023

Good morning, Madam Chair and Committee members, my name is Rebecca Binstock. I serve as the Executive Director of the North Dakota Ethics Commission and I am submitting this testimony on behalf of the Ethics Commission. The Ethics Commission maintains a neutral position on engrossed HB 1485.

When HB 1485 was first introduced, the Ethics Commission opposed the bill as it restricted the application of Article XIV of the North Dakota Constitution. However, HB 1485 saw substantial changes after it was introduced before the House Industry Business and Labor Committee. Those changes were the result of extensive discussions with myself and the Commission's general counsel, Assistant Attorney General Allyson Hicks, with Legislative Council and Representative Kasper. Once the amendments to HB 1485 were introduced and eventually adopted, the Ethics Commission took, and maintains, a neutral position on the bill.

Section 1 of Engrossed HB 1485 requires the legislative assembly to adopt conflict of interest rules. The minimal requirements for said conflict of interest rules mirrors the language of House Rule 321 and Senate Rule 321.

Additionally, engrossed HB 1485 states that if the conflict of interest rules enacted by the legislative assembly are at least as restrictive as the conflict of interest rules adopted by the Ethics Commission, the disclosure process portion of the Ethics Commission conflict of interest rules would not apply to the legislative assembly. Essentially, HB 1485 ensures a mechanism to record disclosures of potential conflicts of interest for the legislative assembly, while not limiting the legislative assembly to the mechanism for disclosure as outlined by the Ethics Commission.

Section 1 of HB 1485 aligns with Ethics Commission Advisory Opinion 23-01. **See Attachment 1.**

Section 2 of Engrossed HB 1485 simply states that current House Rule 321, Senate Rule 321, and associated rules on conflict of interest adopted by the legislative assembly are at least as restrictive as the conflict of interest rules adopted by the Ethics Commission. In Advisory Opinion 23-01, the Ethics Commission reached this same conclusion. Thus, Section 2 memorializes that conclusion in statute.

Madam Chair, that concludes my testimony. I will gladly stand for any questions you may have.

Via Email Only

February 14, 2023

John Bjornson
Director, North Dakota Legislative Council
600 East Boulevard Avenue
Bismarck, ND 58505
lcouncil@ndlegis.gov

Re: Request for Advisory Opinion dated January 17, 2023 (No. 23-01)

Dear Mr. Bjornson:

The Ethics Commission ("Commission") is in receipt of your request for an advisory opinion dated January 17, 2023. As previously communicated to you, the Commission has decided to issue an advisory opinion in accordance with N.D.C.C. § 54-66-04.2. The question presented to the Commission for consideration is "whether the commission recognizes House and Senate Rules 321 govern conflict of interest disclosure for members of the Legislative Assembly and therefore the neutral reviewer and disclosure requirements of the commission rule do not apply to the Legislative Assembly." To answer the question presented, a review of Senate and House rules, as well as rules promulgated by the Commission is helpful. The Commission notes the following analysis is based upon the current House and Senate rules.

LEGAL BACKGROUND

North Dakota Legislative Assembly Rules

The following rules are taken from the Senate and House Legislative Manual of the 68th Legislative Assembly of the State of North Dakota. These rules are divided into three (3) sections: House Rules, Senate Rules, and Joint Rules. Of the internal rules adopted, several shape how conflicts of interest are disclosed and managed within the Legislative Assembly. Our review of these rules begins with Senate Rule 321:

Every member who is present, before the vote is announced from the chair, shall vote for or against the question before the Senate, unless the Senate excuses the member. If the member has not voted before the key is closed, the member shall vote before the vote is announced. A member cannot cast a vote on behalf of another member unless the vote is cast according to verbal instructions announced to the Senate by that other member while present. However, any member who has

a personal or private interest in any measure or bill shall disclose the fact to the Senate and may not vote thereon without the consent of the Senate. A 'personal or private interest' is an interest that affects the member directly, individually, uniquely, and substantially.

Senate Rule 321. A nearly identical rule applies in the House with only minor, inconsequential differences in language. See House Rule 321. Of most import to the discussion is the portion of House Rule 321 and Senate Rule 321 that directs a member to disclose a personal or private interest in a measure or bill: "[A]ny member who has a personal or private interest in any measure or bill shall disclose the fact to the Senate and may not vote thereon without the consent of the Senate." Senate Rule 321. The rules then define a "personal or private interest" as "an interest that affects the member directly, individually, uniquely, and substantially." Senate Rule 321. Senate Rule 322 then describes the process under which a member asks to be excused from a vote. Specifically, Senate Rule 322 provides:

When a member asks to be excused, or declines to vote, the member shall be required to state the member's reasons. Upon motion, the question must be put to the Senate, 'Shall the member, for the reasons stated, be permitted to vote?' which must be decided without debate. These proceedings must occur before the taking of the vote.

Senate Rule 322. House Rule 322 has identical language to that of Senate Rule 322. The Commission is also cognizant of Senate Rule 324 and House Rule 324 which permits a standing rule of either house to be "reconsidered" or "suspended" by a vote of a majority of the members present. Last, the Commission considers Joint Rule 1001, entitled "Legislative ethics policy." Sections 5 and 7 of Joint Rule 1001 recognizes the inevitability of conflicts of interest for members of the Legislative Assembly and the importance of ethical standards:

The increasing complexity of public policy at all levels, with intervention into private affairs, makes conflicts of interest almost inevitable for every part-time public official, and particularly for a member who must vote on measures affecting the life of every citizen or resident of the state. Consequently, the adoption of standards of ethics does not impugn a member's integrity or dedication; rather, it recognizes the increasing complexity of government and private life and provides members with helpful advice and guidance when confronted with difficult problems in that gray area involving action that is neither clearly right nor clearly wrong.

...

If public confidence in the Legislative Assembly is to be maintained and enhanced, it is not enough that members avoid acts of misconduct. They also must avoid acts

that may create an appearance of misconduct.

Joint Rule 1001(5) & (7). Moreover, Joint Rule 1002 defines ethical standards for the Legislative Assembly to include compliance with all other rules relating to ethics.

North Dakota Administrative Code Article 115-04

In October 2022, the Commission promulgated conflict of interest rules pursuant to its constitutional rule-making authority. See N.D. Const. Art. XIV. These conflict of interest rules apply to “public officials” in North Dakota, including members of the Legislative Assembly. N.D.A.C. §115-04-01-02. Section 115-04-01-02 of the North Dakota Administrative Code requires that “[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.” N.D.A.C. § 115-04-01-02(2). Section 115-04-01-02 also directs that the public official must disclose the potential conflict of interest prior to taking any action or making any decision and must provide sufficient information “concerning the matter and the public official’s potential conflict of interest.” N.D.A.C. § 115-04-01-02(3). The disclosure is to be completed on a written form approved by the Commission. Id.

According to Article 115-04 of the North Dakota Administrative Code, when a public official discloses a potential conflict of interest, he or she may voluntarily recuse and abstain from further action in the matter or the public official may consult with a neutral reviewer. N.D.A.C. §§ 115-04-01-02(5) and 115-04-01-03(2). For a legislative body, absent a policy or rule designating an individual or committee as the neutral reviewer, the remaining individuals of the legislative body are designated as the neutral reviewer. N.D.A.C. § 115-04-01-01(5)(a). If utilized, a neutral reviewer evaluates the disclosure and determines whether the potential conflict of interest is a disqualifying conflict of interest. If the neutral reviewer determines the potential conflict of interest constitutes a disqualifying conflict of interest, the public official then recuses himself or herself and abstains from participating in the matter. N.D.A.C. § 115-04-01-03(3).

For the purposes of Article 115-04, a “potential conflict of interest” occurs when a public official 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.

N.D.A.C. § 115-04-01-01(2). A “significant financial interest” is a “direct and substantial in-kind or monetary interest, or its equivalent, not shared by the general public.” N.D.A.C. § 115-04-01-01(8). A “relationship in a private capacity” means “a past or present commitment, interest, or relationship of the public official in a matter involving the public official’s immediate family, individuals residing in the public official’s household, the public official’s employer, or employer

of the public official's immediate family, or individuals with whom the public official has a substantial and continuous business relationship." N.D.A.C. § 115-04-01-01(7).

Moreover, when either the public official or the neutral reviewer evaluates a potential conflict of interest, N.D.A.C. § 115-04-01-03(7), provides the following standards to guide the decision to recuse:

- a. Appropriate weight and proper deference must be given to the requirement that a public official perform the duties of elected or appointed office, including the duty to vote or otherwise act upon a matter, provided the public official has properly disclosed the potential conflict of interest as required by this rule.
- b. A decision that requires a public official to recuse or abstain from further action or decision in a matter should only occur in cases where the independence of judgment of a reasonable person in the public official's situation would be materially affected by the disclosed potential conflict of interest.
- c. The review of a potential conflict of interest and any decision that would require a public official to recuse himself or herself or abstain from further involvement in a matter shall consider any applicable North Dakota law which precludes the public official from recusal or abstention in the matter.
- d. It is presumed that a public official does not have a disqualifying conflict of interest if the public official would not derive any personal benefit which is greater than that accruing to any other member of the general public or any general business, profession, occupation, or group affected by the matter.

N.D.A.C. § 115-04-01-03(7). When a public official discloses a potential conflict of interest, such disclosure is to be reported to the Commission by completing a form available on the Commission's website and submitting the form to the Commission.

Article 115-04 also contains a "safe harbor" provision which provides the Commission will not find a violation of article XIV of the Constitution of North Dakota or the conflict of interest rules if:

- a. The public official consults with and adheres to the neutral reviewer's suggested course of action;
- b. The public official acts in good faith; and
- c. The disclosed materials facts surrounding the potential conflict of interest are substantially the same as the facts presented in the complaint.

N.D.A.C. § 115-04-01-03(4).

The conflict of interest rules within Article 115-04 apply to members of the Legislative Assembly, unless the Legislative Assembly adopts conflict of interest rules which are as restrictive as or more restrictive than those in Article 115-04. See N.D.A.C. §§ 115-04-01-02 and 115-04-01-05. Pursuant to Article 115-04, if the Legislative Assembly has adopted conflict of interest rules that are more restrictive, those rules then control. However, the requirement to report the disclosure of a potential conflict of interest is not displaced by an adopted conflict of interest rule or policy. N.D.A.C. §115-04-01-02(1).

ETHICS ANALYSIS

The question presented in the request for an advisory opinion essentially asks whether the conflict of interest rules adopted by the Legislative Assembly, namely Senate and House Rules 321 and 322 read in conjunction with the additional rules discussed above, are "at least as restrictive as or more restrictive" than those contained in Article 115-04 and control when a member of the Legislative Assembly evaluates a potential conflict of interest. The companion, follow-up question is then whether the neutral reviewer and disclosure requirements of Article 115-04 apply to members of the Legislative Assembly.

The analysis of whether House and Senate Rules 321 are more restrictive, or at least as restrictive, as the requirements of N.D.A.C. § 115-04-01 should be viewed in the context of the substance of the rules, not necessarily whether the language is identical or similar. When evaluating whether a conflict of interest rule adopted by an agency, board, body, or commission is more restrictive, or at least as restrictive, than the conflict of interest rule outlined in N.D.A.C. § 115-04, the Commission considers the scope of potential conflict of interests subject to the rule, the format and process of disclosure of a potential conflict of interest, and the evaluation of the potential conflict of interest by the agency, board, body, or commission.

Scope of Potential Conflicts of Interest

Senate and House Rules 321 require a member of the legislative body to disclose a personal or private interest in any measure or bill. Personal or private interest is defined as an interest which affects the member "directly, individually, uniquely, and substantially." Senate and House Rule 321. For the purposes of Article 115-04, a "potential conflict of interest" occurs when a public official must make a decision or take action in a matter in which the public official has: received a gift from one of the parties; a significant financial interest in one of the parties or in the outcome of the proceeding; or a relationship in private capacity with one of the parties. N.D.A.C. § 115-04-01-01(2). A "significant financial interest" is a "direct and substantial in-kind or monetary interest, or its equivalent, not shared by the general public." N.D.A.C. § 115-04-01-01(8). Additionally, a "[r]elationship in a private capacity" means

a past or present commitment, interest or relationship of the public official in a matter involving the public official's immediate family, individuals residing in the public official's household, the public official's employer, or employer of the public official's immediate family, or individuals with whom the public official has a substantial and continuous business relationship.

N.D.A.C. § 115-04-01-01(7).

For the purposes of its analysis, the Commission finds the language in Rule 321¹ requiring disclosure of a “personal or private interest” in any measure or bill parallels the language of Article 115-04 requiring disclosure of a potential conflict of interest. While the language of Article 115-04 and Rule 321 are distinct, the plain meaning of both encompass and identify nearly identical interests which can create disqualifying conflicts of interest. While the language of N.D.A.C. § 115-04-01-01(2) is broader in some respects, that breadth serves the purpose of ensuring the rule applies not only to members of the Legislative Assembly, but to members of boards and commissions, legislative employees, state-wide elected officials, and members of the governor’s cabinet. For the purposes of applying Section 115-04-01-01(2) to members of the Legislative Assembly, the language of Rule 321 is at least as restrictive in defining the scope of potential conflicts of interest to be disclosed. Both rules require disclosure when a member has a significant financial interest in the outcome of a measure or bill that is unique to that member, when a member has received a gift (as defined in N.D.A.C. § 115-04-01-01(3)) from a party, or when a member has a relationship in private capacity with a party. Therefore, the Commission finds Rule 321, read in conjunction with the additional Senate and House rules previously discussed, is at least as restrictive in defining the scope of potential conflicts of interest required to be disclosed by members of the Legislative Assembly.

Process of Disclosure for Potential Conflicts of Interest

Rule 321 requires any member of the Legislative Assembly who has a personal or private interest in a matter or bill, to disclose the matter to the legislative body prior to a vote on the matter or bill. The legislative member may not vote on any matter in which the member has a personal or private interest without the consent of the legislative body. Rule 321. In the opinion of the Commission, Rule 321 establishes a mandatory process for disclosure of a personal or private interest which precludes a member’s participation in any vote until the legislative body has considered the matter. What is unclear is whether Rule 321 requires the facts underlying the potential conflict of interest, i.e. the facts giving rise to the personal or private interest in a matter or bill, are required to be disclosed. However, the Commission looks to Rule 322, which directs that when a member asks to be excused, or declines to vote, “the member shall be required to state the member’s reasons.” Senate Rule 322.

N.D.A.C. § 115-04-01-02 establishes a similar mandatory disclosure process. Section 115-04-01-02 directs that a public official must disclose a potential conflict of interest prior to taking any action or making any decision and must provide sufficient information “concerning the matter and the public official’s potential conflict of interest.” N.D.A.C. § 115-04-01-02. However, unlike Rule 321, Section 115-04-01-02 permits the legislative member to voluntarily recuse himself or herself and abstain from further action in the matter without input from the remaining members of the legislative body. N.D.A.C. § 115-04-01-02(5).

¹ The reference to “Rule 321” herein refers collectively to House Rule 321 and Senate Rule 321 as enacted on the date of this opinion’s publication as the pertinent language of the rules to the issue before the commission is identical.

To determine whether this portion of the Senate and House rules are more restrictive, or at least as restrictive, as the requirements of N.D.A.C. § 115-04-01, the Commission compares how these rules facilitate disclosure. Both rules similarly require disclosure of a potential conflict of interest. Rule 321 automatically precludes a member of a legislative body from voting “without the consent of the legislative body.” Rule 321. Whereas Section 115-04-01-02 permits the legislative member to voluntarily recuse without input from the remaining members of the legislative body. Based upon the plain language of the rules, Rule 321 is more restrictive.

Nonetheless, the Commission takes note of the absence in Rule 321 of the requirement to disclose the sufficient information concerning the matter and the public official’s potential conflict of interest. However, the Commission looks to Rule 322², which directs that when a member asks to be excused, or declines to vote, “the member shall be required to state the member’s reasons.” Rule 322. In the Commission’s view, disclosing sufficient information for the remaining members of a legislative body to evaluate a potential conflict of interest is inherent in Rule 322. The Commission advises that the best practice when declaring a conflict of interest is to provide sufficient information underlying the potential conflict of interest and encourages members of the Legislative Assembly to do so.

Evaluation of Potential Conflicts of Interest

Rules 321 and 322 establish a mandatory procedure that any member-disclosed personal or private interest in a matter or bill must be submitted to the full legislative body for consideration prior to the member voting. The member may not vote without the consent of the remaining legislative body. Rules 321 and 322 do not instruct on the factors the legislative body is to consider when evaluating whether a member is precluded from voting based upon the disclosed personal or private interest in a matter or bill.

Article 115-04 takes a different approach. Under N.D.A.C. §§ 115-04-01-03(2) and (3), a member with a potential conflict of interest may either recuse himself or herself from a matter and abstain from voting or defer the evaluation of the potential conflict of interest to a “neutral reviewer.”³ If the “neutral reviewer” concludes that the disclosed potential conflict of interest constitutes a disqualifying conflict of interest, the member must recuse from the vote. When either the public official or the neutral reviewer evaluates a potential conflict of interest, Section 115-04-04-03(7), provides the standards to guide the decision to recuse, most notably advising recusal by a public official where the independence of judgment of a reasonable person in the public official’s situation would be materially affected by the disclosed potential conflict of interest.

² The reference to “Rule 322” herein refers collectively to House Rule 322 and Senate Rule 322 as enacted on the date of this opinion’s publication as the pertinent language of the rules to the issue before the commission is identical.

³ For a member of a legislative body, the remaining members of the legislative body are considered as the neutral reviewer. In this respect, Rule 321 and N.D.A.C. Article 115-04 align.

To determine whether this portion of the Senate and House rules are more restrictive, or at least as restrictive, as the requirements of N.D.A.C. § 115-04-01, the Commission compares how these rules evaluate the disclosed potential conflict of interest. The plain language of Rules 321 and 322 do not provide guidance on how a potential conflict of interest is evaluated by the remaining members of the legislative assembly. In fact, the language of Rule 322 indicates a legislative body must decide without debate whether a member may vote after he or she asks to be excused.

While Rule 322 provides no guidance on how to evaluate a potential conflict of interest, other Rules provide some general guidance to members of the legislative assembly. Joint Rule 1001(7) instructs members of the Legislative Assembly not only avoid acts of misconduct, but must avoid “acts that may create an appearance of misconduct.” Joint Rule 1007. Therefore, at a minimum, Senate, House, and Joint Rules require the remaining members to evaluate whether a disclosed potential conflict of interest creates an appearance of misconduct or impropriety.

An evaluation of whether a potential conflict of interest creates an appearance of misconduct or impropriety, by its plain language, is broader than the language used to evaluate potential conflicts of interest contained within Article 115-04 and thus is more restrictive. The best practice is to allow an opportunity for meaningful evaluation of the member’s potential conflict of interest, giving deference to the language of Rule 1007 prior to taking action. Moreover, the Legislative Assembly is free to consider the standards described in N.D.A.C. § 115-04-01-03(7) to guide the decision to recuse. In sum, for the purposes of applying Section 115-04-01-01(2) to members of the legislative assembly, Senate, House, and Joint Rules are at least as restrictive in evaluating of a potential conflict of interest.

Documentation of Disclosure of Potential Conflicts of Interest

The remaining question for the Commission’s consideration is whether the disclosure requirement of Article 115-04 applies to the members of the Legislative Assembly. Section 115-04-01-02 instructs that “[i]n any assessment of a possible conflict of interest, the matter will be reported to the ethics commission in accordance with section 115-04-01-04.” N.D.A.C. § 115-04-01-02. Section 115-04-01-04 directs that disclosure required under the conflict of interest rules in Article 115-04 shall be made using the form approved by the Ethics Commission and available on the Ethics Commission website. Section 115-04-01-04 further directs that public entities are to document in minutes that a public official has been recused from further involvement in the matter.

The Commission reads Sections 115-04-01-02 and 115-04-01-04 in conjunction. The dictate of section 115-04-01-02 is that when a potential conflict of interest is disclosed, the disclosure must be reported to the Commission. However, Section 115-04-01-02 describes the mechanism for how the Commission is notified – either by completing the form approved by the Ethics Commission or documenting any recusal in the minutes.

To be clear, if an entity does not have a conflict of interest rule and Article 115-04 applies by default, the mechanism to report conflicts of interest to the Commission is clearly outlined: disclosure shall be made using the form approved by the Commission. However, when an entity has a conflict of interest rule which is at least as restrictive as Article 115-04, the public entity is to document in the minutes that a public official has been recused at a minimum. That entity may also complete the form approved by the Ethics Commission, but is not required to pursuant to Section 115-04-01-04. This approach allows boards, commissions, and bodies that have unique concerns to adopt conflict of interest rules and a notification mechanism for disclosure of a recusal in the minutes in a manner that meets its needs. For instance, if information underlying a conflict of interest is classified as confidential, a board may adopt conflict of interest rules and a notification mechanism to ensure the confidential information remains confidential with the recusal documented in publicly accessible minutes and the confidential information is not disclosed on the form approved by the Commission.

The Legislative Assembly does not have a rule or policy which governs how disclosures of potential conflicts of interest by members of the legislative body are recorded. While the Legislative Assembly does not maintain minutes in the same way minutes⁴ are kept by boards and commissions, Section 13 of Article IV of the Constitution of North Dakota requires each house of the Legislative Assembly to keep a journal of its proceedings and a record of the votes. The journal, as well as recordings of hearings, work, or votes, is available on Legislative Council's website. Moreover, legislative sessions are open to the public.

Based upon information received from Legislative Council, when a member declares a conflict of interest during a floor session there is a note made in the journal and such disclosure is recorded on video. When a potential conflict of interest is disclosed during a committee hearing or committee work, there is no written record made, but the disclosure is video-recorded and keyword searchable.

The Commission acknowledges that the sheer volume of video and journal entries produced during the 80-day window of legislative session affects how efficiently the public can access information regarding disclosures of potential conflicts of interest and such issue can be meaningfully addressed. Nonetheless, the Commission considers the current recording mechanism equivalent to either submitting the form approved by the commission or documenting a recusal in the minutes to notify the Commission of a conflict of interest as the disclosure is publicly accessible in the same way meeting minute are accessible. Members of the Legislative Assembly, however, are free to complete and submit the Ethic's Commission form as an additional method to document their disclosure of conflict of interest information.

⁴ Pursuant to N.D.C.C. § 44-04-21, minutes of all open meetings must be kept and are public records, open and accessible to the public. Minutes from open meetings are typically posted on the website or at a physical location of a board or commission and can be reviewed within a reasonable time.

SAFE HARBOR

While not directly contemplated by the request for an advisory opinion, the Commission addresses how the safe harbor provision of N.D.A.C. § 115-04-01-03(4) interacts with the above analysis.

Article 115-04 also contains a "safe harbor" provision which provides the Ethics Commission will not find a violation of article XIV of the Constitution of North Dakota or the conflict of interest rules if three (3) conditions have been satisfied: (1) the public official consults with and adheres to the neutral reviewer's suggested course of action, (2) the public official acts in good faith, and (3) the disclosed material facts surrounding the potential conflict of interest are substantially the same as the facts presented in the complaint. N.D.A.C. § 115-04-01-03(4).

The onus of demonstrating the conditions to trigger the safe harbor provision have been satisfied is on the public official. The Commission believes the information outlined on the form approved by the Commission is a good guide for what material facts should be disclosed and the disclosure process to demonstrate the conditions of the safe harbor provision are satisfied. However, whether the public official can take advantage of the safe harbor provision significantly hinges on the quality of the documentation of the disclosed material facts surrounding the potential conflict of interest.

CONCLUSION

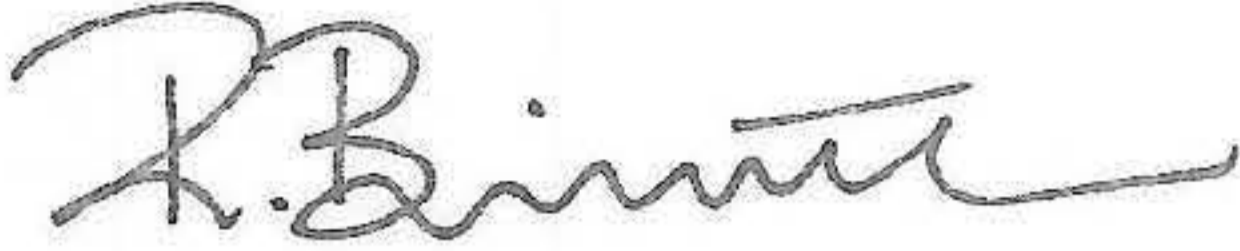
For the reasons set forth above, the Commission answers Director Bjornson's questions as follows:

- (1) The Commission believes the Senate and House Legislative Manual of the 68th Legislative Assembly of the State of North Dakota Rules can be harmonized with the conflict of interest rules in Article 115-04, specifically the applicable Senate, House, and Joint Rules can control the disclosure of conflict of interests, with the guidance provided in Article 115-04 to supplement the Senate and House Rules when those rules are quiet as discussed above.
- (2) The Commission concludes the disclosure requirement of N.D.A.C. §115-04-01-02 apply to the Legislative Assembly. The Commission further finds the mechanism for documenting conflicts of interest in journal entries and video-recordings employed by the Legislative Assembly is equivalent to the mechanism of documenting conflicts of interest in minutes to provide notice to the Commission, thereby satisfying the disclosure requirement.

In accordance with N.D.C.C. § 54-66-04.2, this advisory opinion is to be published on the Ethics Commission website and accessible to the public. The Commission thanks Mr. Bjornson for seeking advice regarding this issue.

This Advisory Opinion was approved by the Ethics Commission at a special meeting held February 14, 2023.

Sincerely,



Rebecca Binstock
Executive Director, North Dakota Ethics Commission

ARTICLE XIV ETHICS COMMISSION

Section 1.

1. The people of North Dakota need information to choose candidates for office, vote on ballot measures, and ensure that their representatives are accountable. This transparency must be sufficient to enable the people to make informed decisions and give proper weight to different speakers and messages. The people therefore have the right to know in a timely manner the source, quantity, timing, and nature of resources used to influence any statewide election, election for the legislative assembly, statewide ballot-issue election, and state government action. This right is essential to the rights of free speech, assembly, and petition guaranteed by the First Amendment to the Constitution of the United States and shall be construed broadly.
2. The legislative assembly shall implement and enforce this section by enacting, no more than three years after the effective date of this article, laws that require 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. The legislative assembly shall have an ongoing duty to revise these laws as necessary to promote the purposes of this section in light of changes in technology and political practices. The legislative assembly shall vest by law one or more entities with authority to implement, interpret, and enforce this section and legislation enacted thereunder. If the laws or rules enacted or an implementation, interpretation, or enforcement action taken under this section fail 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.

Section 2.

1. A lobbyist may not knowingly give, offer, solicit, initiate, or facilitate a gift to a public official. A public official may not knowingly accept a gift from a lobbyist. These prohibitions do not apply if the lobbyist is an immediate family member of the public official. "Gift," as used in this subsection, means any item, service, or thing of value not given in exchange for fair market consideration, including gifts of travel or recreation. However, "gift" does not mean any purely informational material, campaign contribution, or, in order to advance opportunities for North Dakota residents to meet with public officials in educational and social settings inside the state, any item, service, or thing of value given under conditions that do not raise ethical concerns, as determined by rules adopted by the ethics commission. Such rules must be adopted within two years after the effective date of this article. So as to allow for the adoption of these rules, these prohibitions shall take effect two years after the effective date of this article. Appropriate civil and criminal sanctions for violations of this subsection shall be set by the legislative assembly.
2. An elected public official may not be a lobbyist while holding office or for two years after holding office. Appropriate civil and criminal sanctions for violations of this subsection shall be set by the legislative assembly.
3. A lobbyist may not knowingly deliver a campaign contribution made by another individual or entity. "Deliver," as used in this subsection, means to transport, transfer, or otherwise transmit, either physically or electronically. This prohibition does not apply to a person who delivers a campaign contribution to the person's own campaign, or to the campaign of the person's immediate family member. This prohibition shall not be interpreted to prohibit any person from making a campaign

contribution or from encouraging others to make a campaign contribution or to otherwise support or oppose a candidate. Appropriate civil and criminal sanctions for violations of this subsection shall be set by the legislative assembly.

4. A statewide candidate, candidate for the legislative assembly, or public official may not knowingly use a campaign contribution for personal use or enrichment. Appropriate civil and criminal sanctions for violations of this subsection shall be set by the legislative assembly.
5. Directors, officers, commissioners, heads, or other executives of agencies shall avoid the appearance of bias, and shall disqualify themselves in any quasi-judicial proceeding in which monetary or in-kind support related to that person's election to any office, or a financial interest not shared by the general public as defined by the ethics commission, creates an appearance of bias to a reasonable person. The legislative assembly and the ethics commission shall enforce this provision by appropriate legislation and rules, respectively. So as to allow for the adoption of such legislation or rules, this subsection shall take effect three years after the effective date of this article.
6. Governments of foreign countries, foreign nationals not lawfully admitted for permanent residence in the United States, and corporations organized under the laws of or having their principal place of business in a foreign country, are prohibited from making contributions or expenditures in connection with any statewide election, election for the legislative assembly, or statewide ballot-issue election.

Section 3.

1. In order to strengthen the confidence of the people of North Dakota in their government, and to support open, ethical, and accountable government, the North Dakota ethics commission is hereby established.
2. The ethics commission may adopt ethics rules related to ^{1.} transparency, ^{2.} corruption, elections, and lobbying, to which any lobbyist, public official, or candidate for public office shall be subject, and may investigate alleged violations of such rules, this article, and related state laws. The ethics commission shall maintain a confidential whistleblower hotline through which any person acting in good faith may submit relevant information. The legislative assembly shall provide adequate funds for the proper carrying out of the functions and duties of the commission.
3. The ethics commission shall consist of five members, appointed for four-year terms by consensus agreement of the governor, the majority leader of the senate, and the minority leader of the senate. No member of the ethics commission may hold other public office or be a lobbyist, candidate for public office, or political party official.

Section 4.

1. This article is self-executing and all of its provisions are mandatory. Laws may be enacted to facilitate, safeguard, or expand, but not to hamper, restrict, or impair, this article. This article shall take effect sixty days after approval.
2. For the purposes of this article, "public office" or "public official" means any elected or appointed office or official of the state's executive or legislative branch, including members of the ethics commission, or members of the governor's cabinet, or employees of the legislative branch, and "agency" means each board, bureau, commission, department, or other administrative unit of the executive branch of state government, including one or more officers, employees, or other persons directly or indirectly purporting to act on behalf or under authority of the agency.
3. If any provision of this article is held to be invalid, either on its face or as applied to any person, entity, or circumstance, the remaining provisions, and the application thereof to any person, entity, or circumstance other than those to which it is held invalid, shall not be affected thereby. In any case of a conflict between any provision

of this article and any other provision contained in this constitution, the provisions of this article shall control.