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The Honorable Seth M. Grove, Chairperson
House State Government Committee
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Chairperson Grove
Chairperson Conklin
Chairperson Schemel
Members of the House of Representatives State Government Committee,

My name is Robert Caruso, and I am the Executive Director of the Pennsylvania State Ethics Commission. Accompanying me today are the Commission's Chief Counsel, Brian Jacisin, and Jeffery Frankenburger, the Commission's Supervising Investigative Attorney. We are here today pursuant to an invitation of the subcommittee to provide testimony and offer comments regarding the Committee's efforts to increase transparency and strengthen the public's faith and confidence in their government. On behalf of the Commission, we are appreciative of the invitation to participate in today's proceedings and to offer whatever assistance the Committee deems appropriate.

Before providing specific suggestions and comments regarding the proposed amendments to the Ethics Act, which are attached to this document, I believe it would be appropriate to provide a background of the State Ethics Commission for those members who may not be familiar with the duties, responsibilities, and powers of the State Ethics Commission.

The Pennsylvania Public Official and Employees Ethics Act, Act 170 of 1978, became law on January 1, 1979, and in subsequent years was amended and reenacted in 1989, and codified in 1998, and amended in 2006. The State Ethics Commission is an independent state agency charged with the responsibility of administering and enforcing the Ethics Act. The Ethics Act applies to public officials and public employees at all levels of government. Candidates and nominees for public office are also subject to certain provisions of the Act. The Ethics Commission's responsibilities under the Act include rendering advisory opinions regarding the Ethics Act, enforcing the Ethics Act as it relates to the filing of Statements of Financial Interests, investigating alleged violations of the Ethics Act, and issuing decisions in relation to such investigations.

The Commission's duties and responsibilities also extend to the Lobbying Disclosure Law, 65 Pa.C.S. §13A01 et seq., and the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §1101 et seq.

There have been no substantive amendments to the State Ethics Act in nearly thirty years. Over time, the Ethics Act has been shaped by rulings and Court interpretations. Loopholes have been created that have weakened the law and conversely have negatively affected the trust citizens have in their government. As such, the Commission and its staff have prepared a lengthy list of proposed amendments to the Ethics Act. However, for purposes of today's subcommittee hearing, Commission staff has identified some of the amendments which could close some of the more substantial loopholes that currently exist in the Act:

- Requirements for the online filing of Statements of Financial Interests by public officials/public employees at both the state and local level.
- Limitations on gifts and transportation, lodging, and hospitality.
- Amending definitions of key provisions of the Ethics Act including use of the authority of office, immediate family members, and others as delineated.
- Strengthen and clarify the issuance and compliance of Commission subpoenas to be more in line with other state agencies subpoena processes.
- Closing of loopholes created by court decisions which have limited the Commission's ability to impose appropriate penalties under the Ethics Act.
- Amendments to permit the Commission to receive referrals from law enforcement entities to alleged conflicts of interest to be reviewed administratively rather than criminally.

The State Ethics Commission has long supported amendments to the Ethics Act requiring online filing of Statements of Financial Interests by all public officials and public employees. To this end, the Commission initiated a Statement of Financial Interests pilot program for members of the General Assembly and executive branch for the 2014 filing year. Over the past seven years, this system has grown from filings of less than 1,000 for the first year, to over 9,000 filings for the 2021 filing year. Many of these filings, however, are being completed by local public officials. Local government officials have found that filing electronically with the Commission has created a record that often does not exist at the local level. In addition, local governmental bodies view the Commission as a safe repository for the filing of these forms. The Commission believes that substantial benefits can be realized by mandating the filing of

Statements of Financial Interests electronically, including reduction of printing costs of the Commission of approximately \$20,000 annually, and an increase in transparency as the forms are readily available online for public view. In addition to providing for mandatory online filing of Statements of Financial Interests, the Commission has consistently recommended that the penalties for non-compliance with the filing provisions of the Ethics Act be increased from the \$250.00 maximum penalty currently in the law. The Commission and its staff would propose that the maximum penalty be up to \$2,000.00 based on the nature of the deficiency or delinquency and the frequency of such transgressions. A portion of these penalties could be directed toward any cost associated with expanding the Commission's current electronic filing system.

The Commission staff would further offer that the time is right to consider amendments to the gift and transportation, lodging, and hospitality reporting requirements of the Ethics Act. The Ethics Act current reporting requirements for gifts is \$250.00 while the transportation, lodging, and hospitality requirements are \$650.00 in the aggregate in a calendar year. Also, there is no restriction on the type of gift a public official/public employee can receive including cash. Although the House and the Senate have taken measures to prohibit cash gifts, there is no requirement in the Act prohibiting a cash gift. The Commission is supportive of provisions which would ban cash gifts. In addition, Commission staff would also recommend further strengthening the Act by placing some limit to the amount of gifts by public officials and public employees received which would align with other states. Currently, over 40 states either have complete bans on gifts or cap the gift amount a public official can receive in a calendar year from any one source. These amounts vary from \$10.00 to \$400.00 annually. In addition, it is also suggested that limitations be placed on transportation, hospitality, and lodging amounts to limit receipt to those costs that would be directly related to a public official/public employees public position. Lastly, staff would suggest to promote transparency, the General Assembly may wish to consider limiting the amount of a gift or transportation, lodging, and hospitality that a public official can receive from anyone attempting to influence the operations of government.

Discussions to strengthen the Ethics Act should also consider amending definitions of the Ethics Act. Some of the definitions ripe for amendment include "use of the authority of office or employment", "immediate family member", "business with which he/she is associated", and "Conflict" or "conflict of interest."

Commission staff would offer the following definition changes:

"Authority of office or employment." —The actual power provided by law including, but not limited to any decision, approval, disapproval, recommendation, discussion or deliberation, the rendering of advice or other determination as to any proceeding, application, request for a ruling or, contract, claim, controversy, charge, accusation, or other particular over which the public official or public employee exercises authority, influence or the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.

“Business with which he/she is associated.” —Any business in which the public official/public employee [person] , their spouse, child, parent, brother/sister, or a member of the [person’s] public official’s/public employee’s household, [immediate family] serves as a director, officer, owner, [employee] has or is seeking employment, or a contractual or other financial relationship with the business.

“Conflict” or “conflict of interest.” —Use by a public official or public employee of the authority of his/her office or employment or any confidential information received through his/her holding public office or employment for the private pecuniary benefit of himself/herself, [a member of his immediate family] any member of his/her household, any person within his/her family, or a business with which he/she or a member of his/her household or person within his/her [immediate] family is associated. The term does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation or other group which includes the public official or public employee, a member of his/her household, any person within his/her [immediate] family or a business with which he/she or a member of his/her household, any person within his/her [immediate] family is associated.

[*“Immediate family.” —A parent, spouse, child, brother or sister.*]

“Member of his or her household.” Any person having legal residence or living at a public official’s or public employee’s place of residence.

“Any person within his or her family.” any person who is related to any public official or public employee, whether by blood, marriage or adoption, as any of the following: spouse, father, step-father, father-in-law, mother, step-mother, mother-in-law, son, step-son, son-in-law, daughter, step-daughter, daughter-in-law, brother, step-brother, brother-in-law, sister, step-sister, sister-in-law, grandfather, step-grandfather, grandfather-in-law, grandmother, step-grandmother, grandmother-in-law, grandson, step-grandson, grandson-in-law, granddaughter, step-granddaughter, granddaughter-in-law, uncle, step-uncle, uncle-in-law, aunt, step-aunt, aunt-in-law, niece, step-niece, niece-in-law, nephew, step-nephew, nephew-in-law, first cousin, step-first cousin and first-cousin-in-law.

Appellate court interpretations have altered provisions of the Ethics Act including most recently affecting the Commission’s ability to order restitution. Ordering restitution has been one of the Commission’s primary administrative remedies to resolve administrative violations of the Ethics Act.

In Sivick v. State Ethics Commission, 238 A.3d 1250 (Pa. 2020), the Pennsylvania Supreme Court vacated the Commonwealth Court’s and the Commission’s longstanding interpretation of sections 1107(13) and 1109(c) of the Ethics Act. In their opinion, the Supreme Court wrote:

... the lower court suggests that the legislature would have intended that the additional language of the definition of conflict of interest concerning immediate family members be read

into the restitutionary provision because to do otherwise would be "illogical." It is not our role to improve upon the logic of complex statutory schemes like the Ethics Act or to identify and rectify every apparent inconsistency in an effort to make the Act appear more logical by our measure.

...

We do not disagree with the Commonwealth Court that the Act, so understood, creates a risk of inconsistent application. But to call it "illogical" overstates the case. The General Assembly might rationally have concluded that restitution should be among the available sanctions when the moneys diverted were retained or used directly by the offender, while choosing not to authorize such a sanction when diversion to a third (and blameless) party would create the risk of complications exceeding the benefit to be gained, or, alternatively, was perceived as less blameworthy than an official lining his or her own pockets. Notably, the Commission has other arrows in its quiver for sanctioning and deterring Conflicts of Interest. A conflict of interest violation is a felony, and it is punishable by imprisonment of up to five years and a fine of up to \$10,000. In any event, where the language is clear, any further inquiry into or speculation regarding the legislature's overarching vision for the Act is gratuitous.

As it stands, if a public official takes action to award a contract/grant/job to an immediate family member, there can be no assessment of a financial penalty unless it is demonstrated that the public official actually received a financial benefit. The only recourse to the Commission is refer the matter for prosecution. But not all violations of the Ethics Act are, or should be, criminally prosecuted. Most require some type of administrative penalty, usually financial. To that end, further administrative penalties outside of the scope of restitution would allow the Commission more tools to properly adjudicate administrative violations.

The Commission staff believes a legislative remedy available for this "inconsistent application" is amending Section 1107(13) and 1109(c) to include "for themselves, an immediate family member, or a business they or an immediate family member is associated with", is a simple way to ensure that individuals who use their public position for the financial gain of immediate family members are subject to financial penalties in an administrative capacity.

The State Ethics Commission is mandated by Section 1107(14) to "Hold hearings, take testimony, issue subpoenas and compel the attendance of witnesses." This provision could be amended to specifically clarify hearings and investigations. In addition, there is no specific provision in the current law regarding the enforcement of subpoenas. Section 1107(14) could be amended to include language found in Section 505 of Act 29, which created the Office of Inspector General;

Section 505-A. Subpoenas and witness fees.

(a) Authorization.--In accordance with the powers under section 503-A(a) and duties under section 503-A(c), the State Inspector General may issue a subpoena relating to any matter pertinent to an examination to a person under the State Inspector General's jurisdiction or to an individual or a person receiving services from or through an executive agency. If a person fails

or refuses to obey a subpoena, the State Inspector General may petition a court of competent jurisdiction to enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the court order shall be punishable as contempt of court.

(b) Form and effect.--A subpoena under subsection (a) shall be in substantially the same form and have the same force and effect as a subpoena issued by a court of common pleas. The State Inspector General shall have the benefit of the process of the appropriate court of common pleas if necessary to enforce a subpoena.

(c) Confidentiality.--A subpoena issued under this section must clearly indicate on the face of the subpoena that the subpoena is issued in connection with a confidential proceeding and a breach of confidentiality by the person subpoenaed may result in a civil penalty or misdemeanor.

(d) Fees.--Witnesses subpoenaed under this section shall be compensated under 42 Pa.C.S. § 5903 (relating to compensation and expenses of witnesses).

A court of competent jurisdiction could be the Commonwealth Court.

The State Ethics Commission is pleased to offer its assistance to this committee and the General Assembly as it strives to restore confidence in government. As a result of administering the State Ethics Act for over 40 years, the Commission is in a unique position to provide input on strengths and weaknesses of the Ethics Act. The Commission believes such input will be beneficial in achieving meaningful change to continue to ensure public confidence in public officials. The Commission believes that the substantive amendments submitted can be made to strengthen the Ethics Act and eliminate loopholes.

The members and staff of the State Ethics Commission would welcome the opportunity to meet with and assist members and staff of the General Assembly as they address these issues.

SUGGESTED AMENDMENTS TO THE ETHICS ACT

STATEMENT OF FINANCIAL INTERESTS:

1. Electronic filing of Statements of Financial Interests: Consideration should be given to mandatory electronic filing of Statements of Financial Interests at all levels of government. This would require an initial investment to purchase necessary hardware/software which could be offset by the costs of printing and distribution of paper forms. A number of other states have already implemented such provisions and recent technological advancements may lower the overall projected costs. Electronic filing would increase transparency and public access, and also create an audit trail, easing the compliance/enforcement process.
2. Penalties: It is recommended that the Commission should be authorized to impose a monetary penalty for Statement of Financial Interests filing violations greater than the current law allows, particularly for repeat offenders. The Act could be amended to clearly allow for the imposition of penalties not to exceed those found in 65 Pa.C.S. §1109 by the Commission following a finding of a violation of the Act. It is additionally recommended that Statement of Financial Interests penalties of \$250.00 maximum penalty be eliminated or increased to provide penalties up to \$2000, particularly for repeat non-filers.
3. Whether to include in the Ethics Act some form of limitation on gifts, transportation, lodging and hospitality: The General Assembly might wish to consider whether to include in the Ethics Act some form of limitation on gifts, transportation, lodging and hospitality provided to public officials and public employees. Consideration should be given to a ban on cash gifts and a reporting of gifts, transportation and lodging, more in line with other states, such as first dollar reporting, or lowering the threshold amounts to \$50.00 for gifts and \$100.00 for Transportation, lodging, and hospitality.

DEFINITIONS:

4. Use of the authority of office: The definition of the use of authority of office currently provides as follows:

§ 1102. Definitions

"Authority of office or employment." The actual power provided by law, the exercise of which is necessary to the performance of duties and responsibilities unique to a particular public office or position of public employment.

This definition is extremely restrictive and only includes the actual power provided by law with additional criteria to be met in order to establish that someone has engaged in a conflict of interest. This definition should be expanded to encompass all aspects of a person's public office or position and the authority generated as a result of serving in such positions.

5. Immediate family definition: The definition of immediate family members should be modified to include like relatives in-law. Under the current version of the Act, in-laws are not included in this definition and such creates a substantial loophole.
6. Conflict or conflict of interest definition: Clarify the definition of "conflict" or "conflict of interest" to indicate which economic impact(s) are relevant for the de minimis exclusion: the economic impact upon the governmental body/political subdivision and/or the economic impact upon the public official/public employee, immediate family member or business with which such is associated. (All of the relevant economic impacts should be considered, and if all are insignificant, the de minimis exception should be found to apply; however, if any one of them is significant, the de minimis exception should not apply).
7. Represent definition: Change definition of "represent" to delete the word "other" from the phrase "any other person," so it is clear that Section 1103(g) applies to a former public official/public employee representing himself with promised or actual compensation before his former governmental body (e.g., trying to get contracts).
8. Candidate definition: Revise Section 1103(c) to include "candidate" in the list that appears halfway through ("based on any understanding of that public official, public employee, **candidate** or nominee").
9. Income/Honorarium definitions: Better define the terms "income" and "Honorarium" to mirror provisions of the Lobbying Disclosure Law.
10. Hospitality definition: Amend 65 Pa.C.S. §13A03 to account for gifts of food, beverage, event tickets, etc.

"Hospitality." Any Meals; Beverages; Recreation/entertainment, when it is the intent that the meal, beverage, recreation/entertainment be consumed/utilized on premises or immediately. Meals, beverages or recreation/entertainment intended to be consumed/enjoyed at a later time/date shall be considered a "gift" as defined by this section.
11. Amend to Ethics Act to account for *Sivick v. State Ethics Commission*, 238 A.3d 1250 (Pa. 2020).

Amend 1107(13) to read as follows:

(13) Issue findings, reports and orders relating to investigations initiated pursuant to section 1108, which set forth the alleged violation, findings of fact and conclusions of law. An order may include recommendations to law enforcement officials. Any order resulting from a finding that a public official or public employee has obtained a financial gain **for themselves, an immediate family member, or a business they or an immediate family member is associated with,** in violation of this chapter may require the restitution plus interest of that gain to the appropriate governmental body. The commission or the Office of Attorney General shall have standing to apply to the Commonwealth Court to seek enforcement of an order requiring such restitution. This restitution requirement shall be in addition to any other penalties provided for in this chapter.

Amend 1109(c) to read as follows:

(c) Treble damages.--Any person who obtains, **for themselves, an immediate family member, or a business they or an immediate family member is associated with,** a financial gain from violating any provision of this chapter, in addition to any other penalty provided by law, shall pay a sum of money equal to three times the amount of the financial gain resulting from such violation into the State Treasury or the treasury of the political subdivision. Treble damages shall not be assessed against a person who acted in good faith reliance on the advice of legal counsel.

OTHER:

12. **Nonprofit entities:** Although the Pennsylvania Supreme Court has now ruled that nonprofit entities are included in the definition of business, any amendments to the Ethics Act should include a clear delineation of this principle.
13. **Intent:** Expressly state that intent is not required to establish a non-criminal violation of the Ethics Act.
14. **Class/Subclass exception:** Language should be added to the class/subclass portion of the definition of conflict of interest which would state that a class/subclass cannot consist solely of members of the governmental body taking the official action, or their immediate family members, or businesses with which they are associated.
15. **Mandatory training:** An amended Ethics Act should provide for some type of mandatory training for newly elected officials at all levels of government. This training could be developed by the Commission and arranged with the various state and local entities with officials/employees subject to the Ethics Act. The General Assembly might wish to

consider including in the Ethics Act a funding mechanism for training, such as designating that civil penalties collected under the Ethics Act for deficient/delinquent Statements of Financial Interests be deposited into a fund to be used by the Ethics Commission to provide such training.

16. Reasonable expectation of a business relationship developing: Statute should specifically say that a reasonable expectation of a business relationship developing is sufficient to support a finding of a conflict of interest.

17. Inchoate Offenses:

(a) Attempt: Statute should expressly include an “attempt” to obtain a gain as a violation.

(b) Conspiracy: Statute should expressly include language allowing for the charging of a conspiracy to commit a violation of any of the restricted activities found in Section 1103.

18. Subpoena power: The provision for subpoena power in the Ethics Act currently contained in Section 1107(14) should be modified so that it specifically provides for issuance of subpoenas during the investigative process in addition to the hearing process. The law could be amended to include language similar to Section 505 of Act 29, which created the Office of Inspector General as follows:

Section 505-A. Subpoenas and witness fees.

(a) Authorization.--In accordance with the powers under section 503-A(a) and duties under section 503-A(c), the State Inspector General may issue a subpoena relating to any matter pertinent to an examination to a person under the State Inspector General's jurisdiction or to an individual or a person receiving services from or through an executive agency. If a person fails or refuses to obey a subpoena, the State Inspector General may petition a court of competent jurisdiction to enter an order compelling the witness to appear and testify or produce documentary evidence. Failure to obey the court order shall be punishable as contempt of court.

(b) Form and effect.--A subpoena under subsection (a) shall be in substantially the same form and have the same force and effect as a subpoena issued by a court of common pleas. The State Inspector General shall have the benefit of the process of the appropriate court of common pleas if necessary to enforce a subpoena.

(c) Confidentiality.--A subpoena issued under this section must clearly indicate on the face of the subpoena that the subpoena is issued in connection with a confidential proceeding and a breach of confidentiality by the person subpoenaed may result in a civil penalty or misdemeanor.

(d) Fees.--Witnesses subpoenaed under this section shall be compensated under 42 Pa.C.S. § 5903 (relating to compensation and expenses of witnesses).

19. Statement of Financial Interests self-audit process: The Act should be modified so as to impose upon agencies and local governmental entities the responsibility of conducting self-compliance audits that would involve determining whether all individuals who are required to file have in fact filed and whether such forms are complete. This process would enable the Commission to eliminate the need to do local governmental audits except on an as need basis thereby freeing up much staff, time and funding that are currently involved in this process. The audit process should require that a report be made to the Commission on an annual or biennial basis from the self-auditing entities indicating the results of their audits and whether further efforts should be taken to enforce noncompliance.
20. Consent Agreements: The Ethics Act should provide specifically the authority of the Commission, through staff, to enter into consent or settlement agreements and the process involved in completing such. Although there is no prohibition on the Commission entering into consent agreements, in order to avoid any unwarranted challenges in the future, it is recommended that such a provision be included in any amendments to the Ethics Act.
21. Amended Investigative Complaints/Findings Reports and Amended Investigative Notice Letters: Provisions should be provided in the Ethics Act, Investigative Section (Section 1108), that would allow the Investigative Division to specifically make amendments to the charges that have been set forth in the original Notice of Investigation. Such is often required as a result of information that is gathered during the course of ongoing investigations. At the current time, the Act, as written, does not provide for amended notice letters. The Act also should be amended to allow the filing of Amended Investigative Complaints/Findings Reports after 360 days so long as those Amended Investigative Complaints/Findings Reports do not change the nature of the original charges that have been brought.
22. The Statement of Financial Interests filing requirements should be modified to eliminate certain loopholes that have been created by judicial decisions: One specific area should include the requirement for filing information regarding joint obligations.
23. Confidentiality: The confidentiality provisions of the Ethics Act, specifically as they relate to complainants and witnesses, should be modified to be in accord with the recent decision in the United States Court of Appeals for the Third Circuit, *Stilp v. State Ethics Commission*.

24. Solicitor definition: Include solicitors in the definitions of “public official” and “public employee.”
25. Section 1103(j) should be deleted or modified: This provision allows a public official to cast a deciding vote that could potentially benefit himself, a member of his immediate family or a business with which he is associated. This provision would seem to run contrary to the very heart of the Ethics Act and needs to be modified or restricted to extremely limited circumstances.
26. Criminal Record History Information Act (CRHIA): Strong consideration should be given to include the State Ethics Commission as one of the participating agencies in CRHIA. One of the Commission’s primary responsibilities is to conduct investigations of allegations of Restricted Activities (Section 1103) violations of the Act, which carry criminal penalties. The Commission’s investigative staff works with law enforcement, including Office of Attorney General, United States Attorney, local district attorneys and state police. Cases are often compromised, because there cannot be a sharing of information/evidence, since the Commission is not part of CRHIA.

Confidentiality: Amend the Act to allow for the Commission to immediately publicize an Order upon the subject of the Order (Respondent) publicizing or otherwise informing the media/public that they are the subject of a Commission adjudication.

27. Authorize the Commission to impose penalties in a graduating, grading system (similar to how thefts are graded in the crimes code) based on the amount of pecuniary benefit for Sections 1103(a), (b), (c), and (f). Allow this to be in addition to or lieu of restitution, subject to the Commission’s discretion.