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MEMORANDUM

TO: Ethics Commission Members and Staff
FROM: Office of the Attorney General
DATE: July 10, 2025
RE: Comments on Proposed Travel Disclosure Rules

The Office of the Attorney General is committed to transparency and accountability in government and works assiduously with other agencies to promote and fulfill these values. To protect North Dakotans' individual rights and the rule of law, this work must always comply fully with the Constitution of the United States, Constitution of North Dakota, and applicable statutes. The proposed travel disclosure rules published on the Ethics Commission's website fail to satisfy constitutional and statutory requirements. As a result, this office submits the following comments and urges you to make the changes necessary to bring the rules into full legal compliance.

I. The Ethics Commission lacks authority to enact penalties.

The draft rules include a section labeled "**Penalty**" which proposes financial penalties up to \$5,000 plus expenses per violation of the rules.¹ Referring to these amounts as "fees"² does not change their punitive nature and turn them into fees. As this office has discussed with you and testified publicly, the Ethics Commission does not have legal authority to establish or impose monetary penalties. An attempt to impose one of these penalties would be subject to well-founded legal challenge on that basis.

In the published notice for the draft rules, the Commission states that "[t]he proposed rules implement N.D. Const. art. XIV, § 3(2)[,]"³ but neither that section nor any other provision in the Constitution of North Dakota authorizes the Ethics Commission to establish penalties. The North

¹ N.D. Ethics Comm'n, Proposed Travel Disclosure Rules (May 7, 2025), <https://www.ethicscommission.nd.gov/sites/www/files/documents/Proposed%20Travel%20Disclosure%20Rules%20May%202025.pdf>, at 2.

² The Commission also did not comply with state law to enact fees, as described later in these comments.

³ N.D. Ethics Comm'n, Full Notice of Intent to Adopt N.D. Ethics Comm'n Rules (May 8, 2025), <https://www.ethicscommission.nd.gov/sites/www/files/documents/Full%20Notice%20Travel%20Disclosure%20Rules.pdf>.

Dakota Century Code also does not give the Commission such authority. The notice fails to provide a lawful basis for the rules on penalties because there is none.

Article XIV, N.D. Const., uses very clear language when describing the authority to establish civil and criminal sanctions for violating ethics provisions. For example, Article XIV specifically states the Legislative Assembly will “set” “[a]ppropriate civil and criminal sanctions” for various types of ethics violations.⁴ There is no similar language granting that power to the Ethics Commission. Nor is there language even implying that the Ethics Commission has such power.⁵ The complete omission of this language in regards to the Ethics Commission – in contrast to the unambiguous language for the legislature – makes it clear that the Constitution does not authorize the Ethics Commission to establish penalties.⁶

Moreover, regardless of the assertion set forth in the February 18, 2025, letter from your counsel to a member of the Legislative Assembly, the language in Article XIV that gives the Ethics Commission generalized rulemaking authority stops short of empowering the Commission to establish and impose penalties.⁷ The Constitution gives the Commission narrowly circumscribed authority – also shared by the Legislative Assembly – to enforce only one provision in Article XIV, and the language used to do so does not include penalties. Specifically, N.D. Const. art. XIV, § 2(5), states “[t]he legislative assembly and the ethics commission shall enforce this provision [regarding bias in quasi-judicial proceedings] by appropriate legislation and rules, respectively.”⁸ In contrast, enforcement is not mentioned at all in other sections related to the Commission or its rulemaking, and penalties are not mentioned at all in the context of the Ethics Commission. Under well-established caselaw, the absence of such language must be given substantive meaning to reflect the plain meaning of the words in the Constitution and the will of the voters who approved Article XIV.⁹

The paragraph that gives the Commission generalized rulemaking authority also gives it the power to “investigate” certain violations.¹⁰ The fact that the power to “investigate” was specially granted to the Commission indicates that that power is not part of the Commission’s rulemaking authority. Because the Commission could not grant itself the power to investigate matters through its own rules, it logically follows that the Commission cannot grant itself the attendant and more consequential power to create and impose penalties through its rules. Such power would have to be provided just as unequivocally as the power to investigate, but it simply wasn’t articulated at all.

⁴ N.D. Const. art. XIV, §§ 2(1), 2(3) & 2(4).

⁵ In contrast, other states’ constitutions have used very specific language affirmatively granting the authority to establish civil penalties when the drafters and voters wanted ethics commissions to have that power. *See, e.g.,* Okla. Const. Art. 29 § 3 (“After public hearing, the Ethics Commission shall promulgate rules of ethical conduct for campaigns for elective state office and for campaigns for initiatives and referenda, including civil penalties for violation of these rules.”) (emphasis added).

⁶ *See, e.g., Kelsh v. Jaeger*, 2002 N.D. 53, ¶ 7, 641 N.W.2d 100 (2002) (courts “must give effect and meaning” to every constitutional provision and construe constitutional provisions to avoid “absurd or ludicrous results”) (citations omitted).

⁷ *See* N.D. Const. art. XIV, § 3(2).

⁸ N.D. Const. art. XIV, § 2(5) (emphasis added).

⁹ *See, e.g., Kelsh*, 2002 N.D. 53, ¶ 7, 641 N.W.2d 100 (2002).

¹⁰ N.D. Const. art. XIV, § 3(2).

Even the ballot language for the initiated measure creating Article XIV stated that the Commission would be responsible for “adopting rules ... and for reporting and investigating alleged violations of those rules and related state laws.”¹¹ There is no mention in the ballot language of enforcement or penalties. That language, which was developed in consultation with the initiated measure committee, reflects an understanding that the Commission would report alleged violations to officials and agencies that have authority to enforce them.

By attempting to create penalties without constitutional authority, the Commission is infringing on the powers of the Legislative Assembly. Elected legislatures have authority to establish penalties – civil and criminal – under the states’ police powers.¹² Unless the Legislative Assembly delegates power under legally appropriate circumstances to the Ethics Commission, the Ethics Commission cannot exercise legislative prerogatives. No statute gives the Commission sufficient authority to adopt the proposed penalties, however. The Commission apparently recognizes this lack of statutory authority because the notice for the draft rules does not cite to any statutory basis for them.

The Legislative Assembly has delegated very narrow authority to the Ethics Commission to impose statutorily established penalties for a specific legal violation, but that authority is not relevant to the draft rules. Section 54-66-03, N.D.C.C., authorizes the Commission to assess certain civil penalties for gifts from lobbyists to public officials. That statute does not give the Commission authority to establish its own, distinct penalties. Nor does it authorize the Commission to impose penalties for any other conduct. The penalties in the draft rules bear no relation to the penalties in N.D.C.C. § 54-66-03, would exceed the specific caps in that statute, and would be imposed for entirely different activities (*i.e.*, failing to report information to the Commission).

The Commission’s staff repeatedly states that the Commission exists outside the three branches of government,¹³ and has declared that “[t]he Commission does not exist in the traditional

¹¹ See N.D. Sec’y of State, Off. Ballot Language for Measures Appearing on the Election Ballot (Nov. 6, 2018), <https://vip.sos.nd.gov/pdfs/Measures%20Info/2018%20General/18GND%20Measure%20Ballot%20Text.pdf> (emphasis added).

¹² See, e.g., *Schmitz v. N.D. State Bd. of Chiropractic Exam’rs*, 2022 ND 113, ¶ 24, 974 N.W.2d 666 (quoting the United States Supreme Court in stating “judgments about the appropriate punishment for an offense belong in the first instance to the legislature”) (citations omitted); *State v. Spilton*, 315 S.W.3d 350, 358 (Mo. banc 2010); *Home Depot U.S.A., Inc. v. Superior Ct.*, 191 Cal. App. 4th 210, 225 (2010); *St. Louis, I.M. & S. Ry. Co. v. Pritchard*, 133 S.W. 176, 177 (Ark. 1910) (“The Legislature may, in the exercise of police power, impose penalties for noncompliance with statutory duties.”); 16D C.J.S. *Constitutional Law* § 2383 (“While the amount of the penalty is within the control of the legislature in the exercise of its police power, this power is subject to the limitation that the amount must not be so grossly excessive as to constitute a deprivation of property without due process of law.”) (citations omitted); *Cf.*, *People v. Union Pac. R.R. Co.*, 141 Cal. App. 4th 1228, 1258 (2006); *Cnty. Council for Montgomery Cnty. v. Invs. Funding Corp.*, 312 A.2d 225 (Ct. App. Md. 1973) (Legislature’s delegation of broad discretion to fix the amount of a civil penalty violates due process and makes meaningful judicial review impossible); *People v. Handzik*, 102 N.E.2d 340, 345 (Ill. 1951) (“The General Assembly has the power to impose penalties and the power to dispose of them . . .”).

¹³ E.g., Letter from Logan Carpenter, General Counsel, Ethics Commission to Representative Austen Schauer on behalf of the Ethics Commission (Feb. 18, 2025) (Ethics Commission is “not a branch of state government”); N.D. Ethics Comm’n, Frequently-Asked-Questions <https://www.ethicscommission.nd.gov/frequently-asked-questions> (last visited July 9, 2025)

sense of checks and balances.”¹⁴ Commission staff and at least one Commissioner have also stated that they believe the Commission’s rules supersede state statutes. Despite the expansive wishes of these individuals, no governmental entity exists without checks and balances in our constitutional republic. To suggest otherwise is tantamount to creating a completely unaccountable super-government comprised of 5 unelected individuals who could nullify duly-enacted state laws and strip the citizens of North Dakota of their right to be represented by duly-elected officials.¹⁵

Ironically, if the Ethics Commission adopts the draft rules and exercises the power to impose penalties of its own creation, the Commission will have the most inherent conflicts of interest in state government. The Commission would assume the roles of the legislature, investigator, prosecutor, judge, and jury in each of its cases without the separation of powers mandated by the Constitution. Moreover, it would trample on the Governor’s constitutional authority to veto legislation because the Commission’s rules are not presented to the Governor for signature or veto.

II. Even if the Ethics Commission could adopt penalties, some penalties in the draft rules are unconstitutionally excessive.

Penalties must be proportionate to the underlying legal violation to avoid being unconstitutionally excessive.¹⁶ Put another way, “[t]he constitutional inquiry regarding excessive fines is proportionality: the amount of the fine must bear some relationship to the gravity of the offense that it is designed to punish.”¹⁷ The Commission’s proposal to charge individuals \$5000 plus expenses for failing to file reports¹⁸ may well constitute an unconstitutionally excessive penalty. The Commission has not articulated a basis for the penalty amounts, and it is unclear how the high dollar amount relates to the gravity of the offense, especially when the information in the demanded reports can often be obtained through open records requests.

(“The Ethics Commission is an independent constitutional entity and is not part of any of the three branches of our state government.”).

¹⁴ Letter from Logan Carpenter, General Counsel, Ethics Commission to Representative Austen Schauer on behalf of the Ethics Commission (Feb. 18, 2025) (emphasis added).

¹⁵ When another state’s ethics commission – which had explicit constitutional authority to enact civil penalties – similarly tried to assert limitless authority to enact substantive law and alter the constitutional structure of a state government, that state’s Supreme Court issued an advisory opinion finding the ethics commission’s attempt was unconstitutional. *In re Advisory Op. to the Governor*, 732 A.2d 55, 62 (R.I. 1999) (“We are of the opinion that the people of this state in adopting the 1986 Constitution had no intention of creating a body so limitless in its power as to constitute a paramount fourth branch of government.”).

¹⁶ See *Schmitz*, 2022 ND 113, ¶ 24, 974 N.W.2d 666.

¹⁷ *State v. Krahwinkel*, 2002 S.D. 160, ¶ 38, 656 N.W.2d 451.

¹⁸ Under the “Penalty” section, the draft rules state: “If a public official knowingly fails to file a travel disclosure statement, knowingly fails to report policy-monitored travel, or knowingly falsifies information in such disclosures, the commission may charge and collect up to a five-thousand-dollar fee. The commission may also collect all expenses incurred in investigating and collecting the fee for a knowing violation under this subsection.” N.D. Ethics Comm’n, Proposed Travel Disclosure Rules (May 7, 2025), <https://www.ethicscommission.nd.gov/sites/www/files/documents/Proposed%20Travel%20Disclosure%20Rules%20May%202025.pdf>, at 2 (emphasis added).

III. Any fees in the draft rules fail to comply with N.D.C.C. § 54-35-27.

Pursuant to N.D.C.C. § 54-35-27, a state agency must obtain approval from the Legislative Assembly, Budget Section, or Emergency Commission before establishing any new fee under N.D.C.C. ch. 28-32.¹⁹ For purposes of § 54-35-27, the Commission is a state agency subject to rulemaking procedures in Chapter 28-32, even though it does not submit its rules to the Administrative Rules Committee.²⁰ The draft rules use the word “fee” in multiple contexts, including when describing what is actually a civil penalty under the “Penalty” section of the draft rules. To the extent any of the dollar amounts in the “Penalty” section are fees, they lack the necessary legislative approval under Section 54-35-27 to become effective.

This office would welcome the opportunity to discuss these issues in further detail with you, so you are aware of the potential consequences, including likely litigation, of the draft rules before you take action on them.

¹⁹ See N.D.C.C. § 54-35-27(7).

²⁰ The Commission apparently recognized it is subject to N.D.C.C. § 54-35-27 by reporting information about its fees pursuant to that statute. See Legislative Council, “Agency Fee Report Summary,” presented to the Government Finance Committee of the Legislative Assembly, (Dec. 2023) (“The Government Finance Committee is assigned to study state agency fees pursuant to North Dakota Century Code Section 54-35-27. Agencies with 40 or fewer fees were required to submit a report to the Office of Management and Budget in July 2022, and the Office of Management and Budget compiled reports for submission to the Government Finance Committee in September 2022. This memorandum provides a summary of the report, which included 265 fees as reported by agencies.”), N.D. Legis. Council Agency Fee Report Summary (Dec. 2023), at 1, <https://ndlegis.gov/sites/default/files/resourcecommittee-memorandum/25.9173.01000.pdf> (emphasis added).