State of Colorado

INDEPENDENT ETHICS COMMISSION
101 West Colfax Avenue, Ste 500, Denver, CO 80203
Ph.: 303/837-2339
Fax: 303/837-2344
E-mail: jane.feldman@state.co.us
doug.platt@state.co.us
www.colorado.gov/ethicscommission

Matt Smith, *Chairperson*
Dan Grossman, *Vice-Chairperson*
Sally H. Hopper, *Commissioner*
Larry R. Lasha, *Commissioner*
Roy V. Wood, *Commissioner*

Jane T. Feldman, *Executive Director*
Doug Platt, *Communication Director*

Advisory Opinion 10-18

(Organization and Funding of Gubernatorial Transition)

SUMMARY:

It would not be a violation of Article XXIX of the Colorado Constitution for private individuals to form a nonprofit organization for the purpose of soliciting and accepting private donations for the gubernatorial transition under the circumstances described in the request, subject to the conditions described in this Opinion.

I. *BACKGROUND:*

The Colorado Independent Ethics Commission (ñIEC or ñCommissionó) received a request from Governor Bill Ritter, Jr. regarding the upcoming transition from Governor Ritterõs administration to his successor, Governor-elect John Hickenlooper.[1] Although the Governor-elect will not take office until January 11, 2010, there are transition activities that must be accomplished in the period between the election and inauguration of the new Governor. These activities include the hiring of cabinet members and staff, developing legislative programs and agendas, and preparing budget recommendations. Colorado law recognizes the importance of a smooth and efficient transition by providing for limited funds and office space for an incoming administration. *See*, C.R.S. §24-8-101 *et seq*. However, due to the Stateõs current financial circumstances, the

[1] The Commission received the request prior to the election.

total amount of funds budgeted for this transition is $12,650, (*See* Interim Supplemental for the Department of Personnel and Administration approved by the Joint Budget Committee in September 2010)[2], and additional funds will be required. In fact, the Governor-electøs transition team anticipates needing approximately $400,000 in donated goods and services and cash to complete the transition. According to the request, governors-elect have previously solicited funds from private donors to help defray costs. However, this is the first gubernatorial transition since the effective date of Article XXIX. The Governor asks whether, consistent with Article XXIX, private individuals may create a nonprofit organization to solicit and accept funds to defray the costs of the transition.

Subsequent to the submission of the request, representatives of Partners for Colorado (ñPFCò), a 501(c)(4) nonprofit corporation, appeared before the Commission to modify and clarify the Governorøs request. PFC was created for the purpose of organizing and administering the transition activities on behalf of the incoming administration. According to PFC, the organization has three directors, none of whom are covered individuals. Neither the Governor-elect nor the Lieutenant Governor elect will have any authority over the day-to-day operations of PFC or expenditures made by the organization. PFC will organize volunteers to assist with identifying, vetting and recommending individuals to serve in senior positions within the incoming administration. PFC has a web site that accepts inquiries from interested individuals. PFC will solicit contributions from businesses and individuals to fund its operations and will rely on in-kind contributions for some services, including legal services, in support of the transition.

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[2] The Department of Personnel and Administration requested $28,750 for the transition, which the JBC reduced. The statute requires ñnot less than $10,000.ò

PFC informed the Commission that all contributions and expenditures will be made public, including timely disclosure on the entity's web site and providing such information to the public and the media upon request. No covered individual will be asked to solicit contributions to PFC, nor will they be permitted to do so. While PFC may pay some staff and consultants, the organization will not retain or compensate any covered individuals. PFC will require contributors to affirm that they are not a registered lobbyist and have no business, proposals or transactions pending before the state upon which the incoming administration is likely to have involvement.

The Commission applauds Governor Ritter for having the foresight to submit this request in advance of the election so that the Governor-elect could rely on an advisory opinion during the transition. The Commission also appreciates the efforts of Governor-elect Hickenlooper's transition team for putting ethics at the top of their agenda.

II*. JURISDICTION:*

The IEC finds that public officials who are elected, but who have not yet been sworn in are not under the jurisdiction of the Commission. See, Advisory Opinion 10-14 (Acceptance of a Luncheon from a Political Subdivision), footnote 2 at page 3. The IEC therefore does not have jurisdiction over the Governor-elect under Article XXIX. The IEC does have jurisdiction over other standards of conduct. One of those standards is C.R.S. § 24-6-203 which concerns limitations on gifts to elected candidates for certain state-wide offices. The Commission therefore may have jurisdiction over these activities. In addition, there may be current public officials and employees participating in the transition activities who are covered under Article XXIX because of their current employment.

III. APPLICABLE LAW:

Section 3 of Article XXIX reads in relevant part:

> (2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars ($50) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

IV. DISCUSSION:

Under the circumstances set forth in the request and by the representatives of PFC, the Commission finds no violation of Article XXIX. However, the Commission expresses concern about the utilization of a privately-funded nonprofit organization to conduct public business and further cautions PFC to avoid conflicts of interest by adhering to strict and timely disclosure and transparency practices.

a. Contributions to PFC are not prohibited by Article XXIX

Section 3 prohibits a public official or employee from soliciting, accepting or receiving any gift or other thing of value worth more than $50 in any calendar year, from a person, either directly or indirectly without that person receiving lawful consideration of equal or greater value in return, unless it falls under an exception.

According to PFC, contributions would be solicited by PFC and money raised would be expended by PFC. The value of the contributions would inure to the benefit of PFC. Although these donations will allow for a smooth transition between the incumbent administration and the new administration, no covered individual will receive personal benefit from the contributions. Therefore, such contributions do not constitute a gift or other thing of value to a covered individual for purposes of the gift ban set forth in Section 3 of Article XXIX.

b. Private funds for public purpose

Section 1(2) of Article XXIX provides:

> The people of the state of Colorado also find and declare that there are certain costs associated with holding public office and that to ensure the integrity of the office, such costs of a reasonable and necessary nature should be born by the state or local government.

While having a privately-funded nonprofit organization pay for and implement transition services does not violate Article XXIX, the Commission feels that this process, ideally, would be a public process, sustained by public resources and subject to the open meetings and open records requirements of state law and public accountability on the raising and expenditures of funds. The Commission acknowledges the practical obstacles (including timing and the poor condition of the state budget) to implementing a public transition process and feels that the process proposed by PFC is acceptable given those practical obstacles. The Commission appreciates that the PFC recognizes the importance of these concerns.

c. Transparency and Conflicts of Interest

The Commission is concerned that soliciting and accepting of funds by PFC may create real and perceived conflicts of interest. Persons and businesses with matters pending before the executive branch of state government in which members of the incoming administration may be involved and may be called upon to take official action should not be permitted to contribute to the PFC. Moreover, registered lobbyists should not be permitted to contribute. Finally, full transparency and disclosure of contributions on a regular basis will aid in creating public confidence that the transition process is not funded by anonymous contributions from interests seeking to curry favor with the incoming administration.

PFC has assured the Commission that potential contributors will be required to affirm that they have no business or matters pending before the Governor's Office, the Office of the Lieutenant Governor or any state agencies and that they are not a registered lobbyist. PFC has also assured the Commission that it will timely disclose the source of all contributions and expenditures. The Commission is satisfied that these safeguards will prevent real or perceived conflicts of interest.

d. *Solicitation of contributions by covered individuals*

As the Commission stated in Advisory Opinion 10-14, having covered individuals solicit gifts on behalf of non-profit entities may be problematic if such covered individuals solicit registered lobbyists or their principals, entities that have business pending before the state or do so in circumstances that suggest the covered individual would ultimately and personally benefit from the gift.

PFC has assured the Commission that no covered individuals will be permitted to solicit contributions to PFC. Therefore, the Commission is satisfied that the conflicts that can arise from such solicitations will be avoided.

e. *Temporary nature of PFC*

Finally, it is significant to note that PFC is not intended to be an ongoing concern that will perform governmental duties. PFC has been formed solely for the purpose of assisting in the transition and it will be dissolved within a few months of the completion of the transition. Therefore, the Commission is satisfied that PFC will not transform into a shell entity intended to permit covered individuals to accept gifts or things of value in violation of Article XXIX.

V. CONCLUSION:

The Commission finds that the creation of a nonprofit organization to organize and implement transition services on behalf of the incoming administration of Governor-elect Hickenooper and the solicitation and acceptance of contributions to PFC would not constitute a violation of Article XXIX. However, the Commission urges PFC to adhere to full and timely disclosure and transparency practices, preclude lobbyists and persons and businesses with matters pending before the state from contributing to PFC and prohibit covered individuals from soliciting contributions on behalf of PFC. The Commission encourages the PFC to assure the openness of the transition as if it were being conducted and paid for by the State of Colorado.

The Independent Ethics Commission

Matt Smith*, Chair*
Dan Grossman*, Vice Chair*
Sally H. Hopper*, Commissioner*
Larry R. Lasha*, Commissioner*
Roy V. Wood, *Commissioner* (Excused, but affirmed the decision at a later time).

November 5, 2010