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(Implementation of Position Statement 16-01 Concerning Home Rule Counties and Municipalities)

I. Introduction

The Colorado Constitution authorizes the Independent Ethics Commission (“Commission”) to give advice and guidance on ethics issues arising under Article XXIX of the Colorado Constitution and any other standards of conduct and reporting requirements as provided by law. In its discretion, the Commission may issue position statements, which are generally applicable written statements providing guidance to public officers, members of the General Assembly, local government employees and members of the public.

The purpose of this Position Statement is to clarify how the Commission intends to implement Position Statement 16-01.

II. Discussion

On December 19, 2016, the Commission adopted Position Statement 16-01 concerning Home Rule Counties and Municipalities. In that Position Statement the Commission attempted to reconcile two provisions of Article XXIX, Section 7. One provision provides that any county or municipality may adopt ethics ordinances or charter provisions that are more stringent than the provisions in Article XXIX. The second provides that Article XXIX is inapplicable to home rule counties or municipalities that have adopted charters, ordinances, or resolutions “that address the matters covered by” Article XXIX. The Commission found that, had the voters intended to simply exempt all home rule counties and municipalities, Section 7 of Article XXIX would have stopped by saying “this article shall not apply to home rule counties or municipalities”, period. Instead, Section 7 contemplates that even home rule counties and municipalities must earn their exemption by fairly addressing the matters covered by Article XXIX. Position Statement 16-01 was adopted after a year of hearings, receiving comments from affected counties and municipalities, and much discussion and deliberation. Position Statement 16-01 attempts to articulate those provisions of Article XXIX that are central and which must be “addressed” by home rule counties and municipalities. Fairly interpreted, the Position Statement makes clear that, although the specific prohibitions of Article XXIX provide a safe harbor for home rule counties and municipalities, such counties and municipalities retain flexibility to depart from those strictures where departures can be justified. However, in departing they bear the burden of proof to justify the departure.

Subsequent to the adoption of Position Statement 16-01, the Commission has received additional feedback to the effect that home rule counties and municipalities have consistently interpreted Article XXIX as being inapplicable to them and that their elected officials and employees have relied on local ethics decisions and rules.

1. **Prospective Application.** The Commission will apply Position Statement prospectively only and will recognize a 6 month grace period for home rule counties and municipalities to adopt conforming codes and processes. Following adoption of Position Statement 16-01 the Commission has received additional feedback concerning the potential unfairness of holding elected and appointed officials to the standard of conduct in Article XXIX where their governing bodies have consistently taken the position, rightly or wrongly, that Article XXIX has no application to them. While the Commission did nothing more in Position Statement 16-01 than

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interpret its organic authority specified in an existing constitutional amendment, and while the affected counties and municipalities could have sought an official determination from the Commission at any time since its creation, the Commission does not believe that employees and elected officials should be penalized with adverse ethics determinations where they may have believed they were not required to comply with Article XXIX. Therefore, as a matter of policy, whether required or not, the Commission elects to apply Position Statement 16-01 prospectively only.

2. Process for determining whether a complaint is frivolous. Under Article XXIX the Commission is tasked with making a threshold determination with respect to every complaint as to whether the complaint is frivolous. That discussion must occur in executive session. If the complaint is deemed frivolous, it is dismissed in open session without making public the complaint, the allegations, or the identities of the complainant or respondent. In order to assist the Commission in adjudicating complaints directed at home rule employees and elected officials, the Commission will include in its standard complaint form a section to permit the complainant to allege facts supporting a determination that the home rule county or municipality has failed to address the matters in Article XXIX. In the future, when a complaint is filed alleging misconduct of an elected official or employee of a home rule county or municipality, the Commission will employ the following process:
 - a. In executive session:
 - i. The Commission will discuss first whether the substance of the complaint in question would be considered non-frivolous under Article XXIX and the Commission's own interpretations.
 - ii. The Commission will discuss whether non-frivolous allegations have been made to call into question whether the applicable home rule county or municipality has properly addressed the matters in Article XXIX.
 - iii. As in the case of other complaints, the Commission may gather additional information before making the frivolous determination.
 - b. In public session:
 - i. If a complaint has been determined to be frivolous, either in substance or as pertaining to whether a home rule county or municipality has properly addressed the matters in Article XXIX, the complaint will be dismissed in open session while maintaining the confidentiality of the complainant, the allegations, and the identities of the complainant and the respondent.
 - ii. Only if the Commission determines that the complaint is non-frivolous on both grounds will it proceed to consider the complaint.
 - iii. If a complaint is determined to be non-frivolous on both grounds, the Commission shall conduct further proceedings to adjudicate the complaint. It will proceed to consider first, whether the home rule county or municipality has, in fact, properly addressed the matters set forth in Article XXIX. If a determination is made, after a hearing, that the local jurisdiction has effectively addressed the matters set forth in Article XXIX, the complaint may be dismissed as outside the Commission's jurisdiction. If a determination is made that the

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local jurisdiction has not properly addressed the matters set forth in Article XXIX, the Commission will proceed to consider the complaint under the standards set forth in Article XXIX and the Commission's interpretations thereof.

3. Standards for reviewing home rule jurisdiction complaints.
 - a. In determining whether a home rule county or municipality has effectively addressed the matters set forth in Article XXIX, the Commission will consider the factors set forth in Position Statement 16-01.
 - b. In addition, in cases where a properly constituted local independent ethics board has determined that specific conduct does not violate a local ethics code, the Commission will not substitute its judgment for that of the local independent ethics board on matters of fact or intent. However, if a properly constituted local independent ethics board fails to appropriately apply its ethics code or applies it contrary to the law or the decisions of the Commission, the Commission retains jurisdiction to review the local independent ethics board's decision.
 - c. The Commission will not normally entertain a complaint about an employee or elected official of a home rule county or municipality until after the complainant has exhausted any applicable complaint process provided by the local jurisdiction. When adjudicating a complaint concerning a home rule county or municipality, the Commission may, among other options, refer the matter to the relevant local ethics board for further proceedings. Exhaustion of the complaint process should not prejudice a complainant with respect to the timely filing requirements of the Commission; as such, the Commission will generally consider the complaint filing date to be the earlier of either the filing date with the local jurisdiction or the filing date with the Commission.
 - d. As an example to help guide local authorities, if a local board, applying the standards set forth in Position Statement 12-01 determines that a gift was not made to an official in a personal capacity, but in an ex officio capacity, the Commission would disregard that determination which is based on all the facts and circumstances only in rare circumstances. However, if a home rule county or municipality were to interpret a gift ban as, for example, permitting expensive junkets paid for by business interests or individuals with business before the city council, contrary to clearly stated precedent applying Article XXIX's gift ban, the Commission would likely find that the local board had not properly addressed the matters set forth in Article XXIX.
4. Process for seeking guidance.
 - a. Home rule counties and municipalities may submit their ethics codes and rules to the Commission for review at any time.
 - b. If the Commission makes an advance determination that a home rule county or municipality has properly addressed the matters set forth in Article XXIX, it will rely on that determination in determining whether a complaint against a home rule county or municipality employee or elected official is frivolous.