

## MEMORANDUM--CONFIDENTIAL

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**To:** MIC3  
**From:** Darren Embry, Samantha Nance, Stuart Michael  
**Date:** March 1, 2023  
**Re:** Review and Analysis of MIC3 Policy Guide

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### I. Introduction and Background

This memo was drafted in response to a request received from MIC3 for a comprehensive legal review of the Commission's internal policies. These policies are published in the MIC3 Policy Guide, which is available at [https://mic3.net/wp-content/uploads/2023/01/MIC3-Policy-Guide\\_V3.pdf](https://mic3.net/wp-content/uploads/2023/01/MIC3-Policy-Guide_V3.pdf). These policies primarily govern the internal practical functions of the Commission; however, in a few cases these policies purport to govern the conduct of the Member States. As these policies are adopted by the Executive Committee and not subject to the Commission's rulemaking procedures, they will not be enforceable against the Member States and are noted herein as an appropriate area to consider for the adoption of a corresponding Rule. This analysis is intended as a continuation of counsel's previous review of the Commission's Rules and the corresponding changes which were adopted by the Commission at its annual business meeting in October 2022.

### II. Applicable Principles

The Compact authorizes the Executive Committee ("ExCom") to develop policies to effectuate and implement the purposes of the Compact. This authority derives primarily from two parts of the model language:

1. Article IX.E authorizes the Commission to establish the ExCom, which "shall have the power to act on behalf of the Interstate Commission, with the exception of rulemaking, during periods when the Interstate Commission is not in session. The executive committee shall oversee the day-to-day activities of the administration of the compact including enforcement and compliance with the provisions of the compact, its bylaws and rules, and other such duties as deemed necessary." (Emphasis added).
2. Article XI.C.1 further provides that the ExCom is empowered to: (a) generally manage the affairs of the Commission; (b) oversee the organizational structure of the Commission, its "operating procedures", and its "administrative and technical support functions", and (c) to coordinate communications and activities with other government organizations.

It is clear from these provisions that the ExCom is empowered to act in the Commission's stead to generally address whatever practical issues are necessary to ensure that the Compact is efficient and effective. However, as the ExCom is explicitly prohibited from exercising rulemaking authority, any policies it might establish to promote the functioning of the Compact must not rise to the level of a rule or infringe

on the Commission's rulemaking authority. The ExCom may establish policies as necessary to define the Commission's operations, govern the conduct of its personnel, and support the functions of the Compact. By establishing these policies, the ExCom can provide for a common understanding of the proper procedures which Commissioners and Commission staff should follow; with this common understanding, Commissioners and staff can perform their obligations consistently and effectively, which in turn will enable to Compact to function at the most effective and efficient level. As with all matters before the Commission, these policies should be interpreted with an eye towards providing the best support possible for military children making complex educational transitions.

### III. Policies and Analysis

#### **1-2014 Travel and Reimbursement Guidelines**- No Concern

This policy dictates how travel expenses are to be tracked and reimbursed for MIC3 personnel; this function is absolutely within the ExCom's authority to oversee the Commission's "day-to-day activities" and "operating procedures." Accordingly, there are no concerns with this policy.

#### **1-2015 Awards**- No Concern

This policy establishes five awards which the Commission may present on an annual basis for "noteworthy contributions to the Commission and its mission" and defines the procedures through which award recipients will be chosen, how each award will be presented, and what achievements will qualify an individual for a particular award. As these awards are intended to recognize individuals who have made extraordinary contributions in furtherance of carrying out the Commission's purpose, this policy falls within the ExCom's authority to "manag[e] the affairs of the Commission in a manner consistent with the bylaws and purposes of the Interstate Commission".

#### **1-2016 Finance**- No Concern

This policy defines the procedures for managing "financial and budgetary documents on behalf of the MIC3." This falls squarely within the ExCom's authority to manage the "administrative and technical support functions" of the Commission.

#### **2-2016 Records Retention and Guidelines**- No Concern

This policy governs the management of "records and documents produced by the MIC3". While record retention and production to the public is traditionally an area governed by state and federal sunshine laws, this policy is expressly "not applicable to records or documents produced by member states which are maintained in accordance with policies and procedures established by their respective states." This carve-out leaves only the documents and records of the Commission itself to be governed by this policy, a function well within the scope of the ExCom's authority.

#### **1-2017 State Coordination**- **Rule Needed; Cautionary Note**

This policy "applies to signatory states to the Interstate Compact on Educational Opportunity for Military Children and Compact Commissioners or Designees appointed to represent those states to the National Commission" and purports to ensure "compliance with the Statute or Code requirements that each member state maintains a Compact Commissioner and a State Council". This policy establishes new *mandatory* procedures that ultimately entitle the Executive Director to refer a Member State to the Compliance Committee for either (1) failing to fill a vacant Commissioner's seat within 60 days of the vacancy, (2) failing to establish a State Council within one year of the appointment of a new Commissioner, or (3) failing to

submit certain information to the Commission within 60 days of the end of the Commission's fiscal year. These mandatory requirements are de facto interpretations of the model language which establish new and allegedly binding requirements on the Member States.

Where material questions of sufficient performance under the Compact are not explicitly answered by the model language (i.e. how and when must a Member State appoint its Commissioner or establish its State Council?), those questions are left to the sovereign discretion of each of the Member States. As these questions are left up to the Member States to determine for themselves, the Member States can only be bound to requirements beyond the explicit text of the model language when they have consented to those additional requirements through the rulemaking process. As this policy purports to impose new requirements on the Member States, and where any failure to comply with these new requirements could be grounds for enforcement action, it goes beyond the ExCom's authority to facilitate the functioning of the Commission and impermissibly encroaches on the Commission's rulemaking authority.

Because the text of this policy would impose mandatory requirements on the Member States, it must be ratified by them in a Rule before it can be used as the basis for an enforcement action. Interstate compacts fundamentally rely on the concept of the consent of the Member States to be bound by the terms of the Compact; where the Member States have not consented to these requirements through rulemaking, they cannot be bound by them.

### **2-2017 Code of Conduct- Cautionary Note**

This policy establishes a code of conduct for MIC3 Commissioners, and requires them to complete an attached "Code of Conduct Form" on an annual basis. Should any Commissioner fail to comply with this policy, "The Commission may notify the appropriate appointing authority in the home state of the Compact Commissioner regarding any concerns it may have with respect to the conduct of said Compact Commissioner". These actions do fall within the ExCom's authority to oversee the operations of the Commission, but it should be noted that not even the Commission is entitled to discipline, remove, or sanction a Commissioner; that power is reserved for the Commissioner's appointing authority. Theoretically, a Commissioner could engage in gross and obvious violations of the Commission's code of conduct and conflict of interest policies and both the Commission and the ExCom would be powerless to take action against that individual or against the Member State that appointed such a Commissioner.

Should the Commission desire the power to police the conduct of its members, it must establish a Rule empowering it to do so. Anything short of a formal Rule may be advisory only. Even with the adoption of a Rule, the consequence of a Commissioner violating the code of conduct cannot be removal (even de facto removal) of such Commissioner, since such power is reserved to the Member State's appointing authority.

### **3-2017 Accessing General Counsel- Special Note**

This policy general requires that any communications directed to MIC3's general counsel be routed through the Executive Director, who may then forward those communications to counsel at their discretion. The policy further directs that legal costs incurred due to communications with counsel that were not approved by the Executive Director will not be paid.

This policy plainly falls within the ExCom's authority to manage the operations and support functions of the Commission. For clarity, it must be noted that the scope of representation of any legal counsel would be as to MIC3 as an organization. Commissioners should be advised that counsel has been engaged to represent

the Commission generally and that this representation does not extend to any personal or individual representation of any Commissioner or member of the Commission's staff, regardless of their position or Committee membership. In carrying out its representation of the Commission, counsel's conduct will be governed generally by its representation agreement with the Commission, the applicable rules of professional ethics, and counsel's professional judgment.

### **1-2019 Resolving Compliance Issues**- No Concern; Cautionary Note

This policy lays out a procedure for the internal escalation of enforcement matters prior to their referral to the Compliance Committee. As the ExCom is empowered to oversee "enforcement and compliance with the provisions of the compact", this policy is within the ExCom's authority to establish.

However, to facilitate the efficient and transparent resolution of compliance concerns, it is recommended that a new section be added to this policy which would (1) allow the Executive Director or the Chair of the Compliance Committee, as appropriate, to immediately refer a suspected case of non-compliance to the ExCom when appropriate, and (2) require that notice be provided to any involved Commissioners when an enforcement matter is referred to the ExCom. It is also recommended that the Rules Committee consider a new Rule, which would act in tandem with this policy, which would provide any Commissioner involved in an ongoing compliance matter with an opportunity to attend a special meeting of either the Compliance or Executive Committee in order to discuss the Committee's compliance concerns.

### **2-2019 Conflict of Interest**- Cautionary Note

Similarly to Policy 2-2017, this policy (and its attendant Conflict of Interest Form) is intended to govern to conduct of MIC3's Commissioners by requiring that Commissioners (1) disclose any potential conflicts of interest which may impact their ability to "conduct business in a 'fair and impartial' manner" (sic), and (2) advise the Commission Chair of any actual conflict of interest and recuse themselves from participation in any meeting concerning the matter giving rise to the conflict. In the event that a situation is unclear, the ExCom is empowered to determine whether a conflict exists and may "decide the appropriate action". As with Policy 2-2017, this policy acknowledges that a Commissioner may be removed only by their appointing authority, and that the Commission may at most notify such an appointing authority of its concerns regarding a conflicted Commissioner.

The fundamental elements of this policy are within the ExCom's authority to oversee the functions of the Commission, but in empowering the ExCom to determine unilaterally that a Commissioner is conflicted this policy comes close to impermissibly expanding the ExCom's authority beyond what is provided to it by the model language. As written, there is no issue with this policy. However, should the Commission wish to initiate an enforcement action against a Member State for a violation of this policy, it would first need to ratify the requirements of this policy in a Rule. As discussed above, authority to police the conduct of MIC3 Commissioners is not explicitly granted to the Commission or the ExCom under the model language, and thus it is implicitly reserved to the Member States.

### **3-2019 Guidelines for Commission Meetings**- No Concern

This policy provides guidelines regarding how Commission meetings should be conducted, by *inter alia* adopting Robert's Rules of Order as the procedural standard for these meetings. These provisions fall within the ExCom's authority to govern the day-to-day functions of the Commission and to provide for the effective pursuit of the Commission's objectives. While the policy does include an escalating list of punitive steps that may be imposed upon an individual who disrupts a meeting, any punitive action must first be approved by a



majority vote of the Commissioner's present (or a two-thirds majority of them if a Commissioner is to be expelled). As this policy inherently defers to the authority and approval of the Commission, it is not an impermissible expression of the ExCom's authority.

**4-2019 Ex-officio Representative Role and Conduct**- No Concern

This policy sets out standards for how ex-officio members of the ExCom may participate in the activities of the Commission. This is well within the ExCom's authority to do, and as these ex-officio members are not voting members of the Compact, they have no inherent right to participate in the Compact beyond what is allowed by the ExCom, acting here on behalf of the Commission.

**4-2019 Ex-officio Representative Role and Conduct**- No Concern

This policy fundamentally reiterates the sections of the model language, Rules, and bylaws which allow a Member State to act through its Commissioner, the Commissioner's Designee, or a proxy. The policy's only functional requirement is that a Commissioner or their Designee submit a form identifying any individual who will act as either a Commissioner's Designee or as their proxy before the meeting where that individual will be in attendance. This falls squarely within the ExCom's authority to oversee the administrative functions of the Commission.

**1-2020 Policy Development and Approval**- No Concern

This policy set out the procedure by which the ExCom's policies will be drafted, approved, reviewed, and enforced, and cites the authority under which these policies are enacted. As discussed *infra*, the ExCom is empowered to establish policies for the Commission, but only insofar as those policies are a fundamental expression of the ExCom's legitimate authority. Given that the ExCom is generally empowered to enact policies in this way, a policy describing how other policies should be made is likewise within the ExCom's purview as an expression of its authority to oversee the administrative functions of the Commission. Notably, the ExCom's authority to enact policies does not derive from this policy, but from the Compact's model language.

**2-2020 Investment**- No Concern

This policy establishes the principles, objectives, and standards by which the Commission's operating funds will be invested, subject to the approval of the Finance Committee. This is a clear and plan expression of the ExCom's authority to "manage the affairs of the Commission".

**3-2020 Operating Reserve**- No Concern

This policy establishes an operational reserve fund to be maintained by the Commission and utilized in the event of a budgetary shortfall. As with Policy 2-2020 above, this falls well within the ExCom's authority to manage the affairs of the Commission, and to provide for its practical functionality.

**1-2021 Staffing In-Person Meetings During COVID-19 Pandemic**- No Concern

This policy sets out the procedures to be followed by MIC3 staff during the pendency of the COVID-19 pandemic. As the ExCom is explicitly authorized to oversee the administrative functions of the Commission, there is no issue with this policy.

**2-2021 Attendance by MIC3 Employees at In-Person Events Convened by Other Entities During the COVID-19 Pandemic**- No Concern

Like Policy 1-2021 above, this policy sets out additional standards of conduct for MIC3 staff which are necessitated by the pandemic. The ExCom is well within its authority in enacting these policies.

### **3-2021 Establishing Health and Safety Protocols for In-Person MIC3 Events Convened During the COVID-19 Pandemic**- No Concern

See analysis of Policies 1-2021 and 2-2021 above.

### **1-2022 Policy for COVID-19 Vaccination**- No Concern

This policy mandates COVID-19 vaccinations for all MIC3 staff. Again, there is no issue with the ExCom issuing directives to the Commission's administrative staff.

### **2-2022 Open Records Request**- No Concern

This policy provides generally that the records of the Commission will be managed in accordance with the Kentucky Open Records Act (codified in KRS 61.870 – 61.884). As the ExCom is fully empowered to oversee the “administrative and technical support functions” of the Commission, this policy is well within the ExCom's authority to enact.

### **Recommendation for New Policy or Rule**

In light of recent compliance concerns arising from changes to Compact statutes or related statutes in a number of Member States, it is recommended that the Commission consider the adoption of a new Rule or Policy which would clarify the following obligations of each Commissioner:

1. Each Commissioner shall be responsible for monitoring the status of the Compact statute enacted in their state, and the status of any statutes related thereto; and
2. Upon becoming aware of any proposed legislative amendments to any of these statutes, the Commissioner shall promptly provide notice of these anticipated changes to the Executive Director, who will then refer the matter to counsel for legal review as appropriate.

Clearly establishing this procedure for the review of anticipated or proposed legislative changes to a Member State's laws should allow for the transparent and timely analysis of such changes. A timely review of these changes will facilitate internal discussions regarding the import of any such changes, and what steps the Commission may or may not need to take to address any resulting issues. As always, the intention here is to preserve the integrity of the Compact and the membership of the Commission.

## **IV. Conclusion**

Generally, the policies established by the MIC3 ExCom and published in the Policy Guide are valid expressions of the broad authority granted to the ExCom in the model language of the Compact to oversee the necessary and practical functions of the Commission. However, as in Policy 1-2017, the ExCom exceeds this authority when it infringes upon the rulemaking authority of the Commission; any such policies must be ratified by a Rule of the Commission before they can be validly enforced against a Member State. As a general guideline, it may be useful to remember that interstate compacts are fundamentally cooperative organizations; where a Member State has not agreed to be bound by a certain provision, a Rule will be required to enforce that provision against them. As discussed above these policies, and any issues that might arise under them, should be interpreted and applied with the intention of maximizing the Commission's ability to provide military students moving between states with the rights and privileges afforded to them under the Compact.