Assessment of Public Comment – Part 943

During the official public comment period, the New York State Joint Commission on Public Ethics ("Commission") received fifteen (15) written comments from multiple sources regarding the Commission's proposed regulation, which adds a new Part 943. The comments generally commend the Commission on its efforts to set forth clear and comprehensive Lobbying regulations and also raise issues for the Commission to consider.

Direct Lobbying

Multiple commenters raised concerns about the provision regarding the definition of "Direct Lobbying," specifically the reference to communications made in the public domain when there is a clear intent to reach the Public Official, for example, on a billboard placed on a highway exit at the Capitol, or a rally outside the Capitol. Commenters argued that this provision exceeds constitutional limits placed on regulation of Lobbying. Upon further review and consideration, the Commission has deleted this provision.

One commenter suggested that the terms "technical information" and "technical questions" should be further defined. The Commission, however, has determined that these terms are sufficiently clear.

Another commenter suggested that Direct Lobbying should exclude individuals who attend a meeting for training or educational purposes or any similar non-substantive role and who do not play a significant role in the strategy, planning, messaging or other substantive aspects of the overall Lobbying effort. The Commission has included language to address this suggestion.

Regarding Preliminary Contact, multiple commenters recommended that the regulations should exclude those who place phone calls on behalf of a Lobbyist, *e.g.*, a secretary scheduling a meeting for a Lobbyist. The Commission has revised the regulation to provide that persons who schedule a meeting or place a call in a purely administrative capacity are not required to be listed as an Individual Lobbyist.

Grassroots Lobbying and Social Media

The proposed regulations define a "Grassroots Lobbying Communication" as a communication that includes, among other things, a "Call to Action", or request to others to contact a Public Official. Several commenters asserted that the definition of a "Call to Action" is overly broad and should not include a "solicitation, exhortation, or encouragement to the public ... **to solicit, exhort, or encourage *others*** to directly contact a Public Official." Commenters suggested that it should be limited to the solicitation, exhortation, or encouragement to the public, a segment of the public, or an individual to directly contact a Public Official. The Commission disagrees. Limiting a "Call to Action" to a solicitation to the public to directly contact a Public Official themselves, without also including a communication that exhorts the public to tell others to contact Public Officials on an issue, would create a loophole in disclosure.

Regarding a "Call to Action," another commenter noted that Grassroots Lobbying relates to mass calls to action, not individual ones. Defining a Call to Action as a solicitation to an *individual* to contact a Public Official is too expansive and, therefore, they suggested that the regulations should exclude a private suggestion or request to an individual that he or she take action from the definition of Grassroots Lobbying. The Commission disagrees, and notes that such a position is inconsistent with the longstanding interpretation of Grassroots Lobbying.

Regarding social media activities of employees, several commenters expressed concerns about the requirement to identify employees of organizations as "Individual Lobbyists," whether in the Grassroots or Direct Lobbying context. The Commission has revised the language (including the addition of examples) and believes the regulations, as revised, clearly articulate the circumstances under which an employee must be listed as an Individual Lobbyist.

A commenter asserted that social media should not be considered Direct Lobbying (only Grassroots Lobbying), and that any employees who engage in social media should not be identified as Individual Lobbyists. The Commission maintains that Lobbying through the use of social media - when a Public Official is tagged or otherwise directly contacted through social media - can and should be considered Direct Lobbying when all the elements of Lobbying Activity exist.

Another commenter suggested that while social media activity conducted by an employee at the direction of an employer should be reported by the employer, it should not require that employee to be identified as an Individual Lobbyist. Another commenter stated that social media is problematic to report because it may bear little or no expense and cannot readily be controlled or comprehensively monitored. The Commission has made revisions, including the addition of examples, to more clearly articulate when an employee must be identified as an Individual Lobbyist in both the Direct and Grassroots Lobbying context. The regulations will not require employers to track the *private* social media activities of its employees or, in the Grassroots context, list individuals unless they delivered the Grassroots Lobbying Communication, can be identified as the speaker, and helped shaped the message in more than a clerical role.

Lobby Days

One commenter expressed a concern that members or volunteers of organizations might possibly be required to register as Lobbyists if they participate in Lobby Days. The Commission never intended such a result and added language to specifically state that an organization coordinating a Lobby Day is not required to list volunteers or members of such organization as Individual Lobbyists.

Another commenter requested clarification regarding whether employees or members of an organization, who might meet with Public Officials on a Lobby Day, must be listed as a Lobbyist. The Commission added clarifying language to address this concern. Such organization should list as an Individual Lobbyist any employee or Designated Lobbyist that makes Direct Contact with a Public Official and speaks on behalf of the organization at the Lobby Day.

A commenter asserted that not all staff-time spent planning a Lobby Day should be deemed reportable Lobbying because Lobby Days often require administrative and logistical preparation which can transcend efforts to influence public policy as many Lobby Days equally pursue educational and member services goals. The Commission has and will continue to accept a good faith methodology for apportioning time attributable to Lobbying as an acceptable means of reporting this information.

Designated Lobbyists

A commenter asserted that such definition is overly broad and will impose significant additional reporting requirements on regulated entities. They stated that it will also raise uncertainty about activities of a member of the board of an entity, where the board member engages in Lobbying Activities related to the activities of the organization. The Commission disagrees with this comment and maintains that an

organization's board members may speak for the organization and when they do, such activity must be disclosed if it constitutes Lobbying Activity.

Coalitions

The regulations allow a Coalition that expends more than $5,000 on Lobbying to either report its activity as a Coalition, or for the individual members to report their activity on their own filings, as applicable.

A commenter noted that the potential arises for a Coalition scenario in which the Coalition elects not to file as a Coalition and each member contributes less than $5,000 whereby none will be required to file. The Commission maintains that the regulations correctly balance the interests of transparency and the ability to form Coalitions.

Another commenter objected to the requirement that Coalitions be required to report Lobbying Activity (either as an entity, or through the disclosures filed by members of the Coalition), based on the Lobbying Act's definition of a Lobbyist as a person or organization who engages in Lobbying Activities. They further argued the regulation will deter Coalitions of individuals spending small amounts (but more than $5,000 in aggregate) from participating based on (1) difficulty finding a party to be the Responsible Party to submit lobbying filings, thus chilling activities; and (2) confusion surrounding whether a member is required to file their own reports. The Commission has taken all comments regarding Coalitions into consideration and believes the regulations strike the correct balance by providing clear options to a Coalition. The regulations require that Lobbying Activities undertaken by a Coalition (that expends or incurs more than $5,000 in annual Compensation and Expenses related to Lobbying Activity) must be disclosed but offers flexible filing options: either the Coalition files on its own if it has a Responsible Party, or the members, **who exceed $5,000**, file individually.

Multiple commenters expressed a concern that requiring filers to identify and list Coalition members is too burdensome and involves difficulty in knowing the filing status and expenditure levels of each member, thus chilling Coalition formation. The Commission notes that the flexible filing options permit the Coalition to decide on the easiest and most efficient way to file. The Commission also added language to the regulation which allows Coalitions to use and rely upon a questionnaire to ascertain which members exceed the $5,000 threshold and, therefore, need to be listed.

A commenter asserted that although the regulations exclude 501(c)(5) and (6) *corporations*, many Labor organizations qualify as tax exempt under these IRC sections, but are unincorporated associations. The commenter recommended amending the regulation to exclude all qualifying 501(c)(5) and (6) organizations, incorporated or otherwise. All qualifying organizations under IRC Sections 501(c)(5) and (6) were intended to be excluded and the Commission has revised the regulations to address this concern.

Reportable Business Relationships

A commenter argued that the regulations place an undue administrative burden on educational institutions to track adjunct faculty who are also "State Persons." Additionally, two commenters suggested that reportable business relationships be defined to exclude the hiring of SUNY and CUNY faculty by an independent college or university. The Commission finds that the statute is clear on the reporting obligations and any of the changes suggested would require amendment to the statute.

Another commenter argued the proposed rule adopts provisions of JCOPE's reportable business relationship guidance, which provides that in cases involving a Client organization, the term "Client" includes proprietors, partners, directors, or executive management of the organization and, therefore, requires Client organizations to disclose the business relationships of its proprietors, partners, directors, or executive management. The commenter argued that the regulation goes well beyond the statutory definition of "Client" found in the Lobbying Act, and further asserted the proposal adds additional complexity and uncertainty to compliance obligations and, therefore, should be excluded. The Commission disagrees and notes that the proposed regulation adheres to existing guidance that has been in place for years and fills a potential reporting gap. Partners of a Client organization, for example, can and do control the decisions of the organization.

Name of Public Official

The regulations require filers, who have engaged in Direct Lobbying, to disclose in their lobbying reports "the name of the Public Official or Public Official's office or the legislative committee, as applicable, with whom the Lobbyist engaged in direct communication."

A commenter asserted that such a requirement would constitute a significant expansion of current statutory requirements. They point to Legislative Law §§1-h(b)(4) and §1-j(b)(5) which provide that lobbying reports shall contain "*the name of the person, organization, **or** legislative body before which the lobbyist/client has lobbied.*" [Emphasis added.] The commenter stated that mandating disclosure of individuals requires a legislative amendment. A separate commenter, on the other hand, applauded the requirement to disclose the name of the Public Official or Public Official's office. The Commission has carefully considered all comments related to this topic. In fact, based on previous comments, the regulations were revised, prior to the initiation of the Notice of Proposed Rulemaking, to no longer require lobbyists and clients to list the names of all people lobbied (which would have required filers to list the names of every person in a meeting, for example). Instead, the regulations currently require the 'the name of the person, organization, or legislative body" before which the Lobbyist has lobbied and, in the case of Direct Lobbying, "the name of the Public Official or Public Official's office or the name of the legislative committee, applicable, with whom the Lobbyist engaged in direct communication." The Commission finds that the regulations will provide better disclosure to the public than current practice. For example, instead of simply listing "the Assembly" if a Lobbyist met with an Assemblyman or Assemblyman's staff, the regulations would now require the Lobbyist to state the Assemblyman's name or the name of the Assemblyman's office.

General Exceptions

The following issues relate to various exceptions from Lobbying that are contained in the regulations:

Commission Salespersons

The proposed regulations prescribed that a person's commissions must constitute at least 50 percent of their total annual compensation in order to qualify for the Commission Salespersons exception. Multiple commenters noted that the 50 percent threshold creates uncertainty in whether a person will qualify for the exception on a year-to-year basis, thus creating potential Lobbying Act liability depending on the person's success in sales (as commissions constitute a lesser percentage of total compensation when sales are down). The Commission acknowledges the commenters' position and has made amendments to this provision to address their concerns.

Non-lobbying legal services

A commenter noted that this exception, as drafted, should be amended to more clearly address situations when a firm might provide lobbying and non-lobbying services and who should be identified as Individual Lobbyists on a Statement of Registration. The Commission amended this provision by adding an example and language to more clearly articulate what is required.

Gift to Public Official

The proposed rule states that "All Lobbyists and Clients are subject to the gift restrictions set forth in Part 934 of this Title." A commenter asserted this is not consistent with the statute which states "No individual or entity *required to be listed on a statement of registration*…should offer or give a gift to any public official…" The Commission agrees and has amended the regulation accordingly.

Beneficial Client

A commenter claimed that the definition of "Beneficial Client" is too broad. In contrast, a separate commenter supported the definition, which had been revised based on previous comments received prior to the initiation of the Notice of Proposed Rulemaking. The Commission maintains that the definition of "Beneficial Client" is sufficiently clear.

Definition of Affiliated

A commenter stated the definition of Affiliated is still not clear with respect to how it would apply to: unions and local affiliates, associations and their members, corporations and LLCs, and public benefit corporations and their affiliated not-for-profits. The Commission believes that the definition is sufficiently clear.