



Testimony to
Joint Commission on Public Ethics

Comprehensive Lobbying Regulation

Presented by

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On behalf of The Business Council of New York State, Inc., we appreciate this opportunity to address the Joint Commission on Public Ethics (“Commission”) regarding its proposed “Comprehensive Lobbying Regulations” and its proposed amendments to its existing source of funding rule.

Previously, we submitted detailed written comments on both of these proposals, during the formal comment period that closed October 17, 2018.

Today, I would like to highlight and expand upon several issues raised in our written testimony.

The Business Council is in a unique position to provide comment on these regulations. As a state-wide employer advocacy organization, we represent about 2,400 private sector employers of all sizes and in all sectors across New York State, many of whom engage in legislative, regulatory and procurement lobbying and are subject to JCOPE oversight. On behalf of our membership, The Business Council has been long engaged in responding to legislative and regulatory proposals impacting business activities, including those governing advocacy.

In addition, as an advocacy organization, The Business Council is directly subject to the state’s Lobbying Act, and has first-hand experience in interpreting and complying with the state’s lobbying rules. As a trade association with several thousand members, we also face unique compliance obligations not faced by most clients and lobbyists.

First, we commend JCOPE for circulating informal draft rules last fall, and for reaching out to regulated entities and the interested public for input on those initial drafts. That process was a productive one, as it provided JCOPE commissioners and staff with input on key issue and practical compliance concerns. Importantly, it also generated input on proposed language in a setting where concepts and language are more easily amended. As a result, the formal rule proposals published in the State Register this August contains a number of amendments that we and others raised during last fall’s outreach efforts.

Even so, the proposed JCOPE rulemaking still contain a number of issues of concern to us. These include regulatory proposals that are inconsistent with underlying statutory requirements, as well as proposals that failed to provide clear compliance standards – an outcome contrary to one of your main objectives.

Among our most significant concerns were the following:

§943.8(c)(2)(d) – To meet the definition of “commission salesperson,” the proposed rule states that “Commissions paid as portion of sales constitute, or is intended to constitute at least 50% of the person’s total annual compensation.” We have two major concerns. First, this provision is inconsistent with statute, which defines “commission salesperson” as a “person . . . compensated, in whole or in part, by the payment of a percentage amount of all or a substantial part of the sales which such person has caused,” with no fixed share of commission-based income required. Importantly, the Legislative Law already imposes a significant limitation on this exemption, by further defining a “commission salesperson” as an individual whose “. . . primary purpose of whose employment is to cause or promote the sale of . . . an article of procurement.” Therefore, to the

extent that the proposed regulatory language is intended to limit the potential for abuse of this exemption, that concern is already addressed in statute.

Second, as a practical matter, the draft rule's proposed threshold would undoubtedly result in individuals becoming suddenly and unexpectedly subject to the Lobby Act's registration and reporting requirements. This would occur when an individual's level of sales – and therefore the aggregate amount of their commissions -- falls below expected levels at the end of a calendar year.

The type of amendment being proposed here can only be done through statute. Therefore, this proposed restriction on the definition of commission salesperson should be deleted from the final rule.

§943.6(b)(2)(i) and (ii) – The proposed rule provides that a person is not engaged in Direct Lobbying when the person “attends a meeting with a Public Official simply to provide technical information or address technical questions,” provided that the person “plays no role in the strategy, planning, messaging or other substantive aspect of the overall lobbying effort.” We strongly support the effort to provide an exemption for individuals with no substantive role in advocacy efforts, but are concerned that this proposed language is too limiting. We agree that persons providing technical input in such settings are not engaged in lobbying as defined in statute, and this issue should be clarified in both statute and regulation. But there are other circumstances where individuals participate in calls or meetings with public officials, and have no substantive role in the lobbying activity, that would fall outside the proposed exemption language. As example, a junior employee or an intern who attends a lobbying meeting or listens in on a lobbying call for the purpose of professional development or training would still arguably be required to be listed on the statement of registration under this proposed language. Likewise, the utility of the exemption is further limited by the restrictions which would negate the exemption if the person had even minimal input into other aspects of an advocacy effort. To address these, we recommend that clause (iii) be deleted, and clause (i) be amended to say “attends a meeting or participates in a discussion with a Public Official primarily [not “simply”] to provide technical information or address technical question, or primarily to observe for training or educational purposes or has any similar non-substantive role, and does not play a significant role in the strategy, planning, messaging or other substantive aspects of the overall lobbying effort.”

§943.6(a)(2)(i) – The proposed rule would define “preliminary contact” – which would be a component of “lobbying by direct contact” – as including “...scheduling a meeting or telephone call with a Public Official and a Client.” This approach would in effect require persons engaged exclusively in administrative support functions to be designated as lobbyists. We note that the draft rule's provisions relative to grassroots lobbying provides an exemption for “secretaries, clerical and ministerial staff.” A similar exemption should be provided here.

§943.11(f)(7)(i) and 943.12(f)(9)(i) – These provisions of the draft rule would impose a new requirement that lobbyist bi-monthly reports and client semi-annual reports, respectively, identify “. . . the name of the Public Official or Public Official’s office . . . with whom the Lobbyist engaged in direct communications . . .” In saying that the report must identify the name of either the official or the official’s office, this would appear to give the reporting entity the flexibility to identify either. However, to the extent that JCOPE intends to require these filings to identify specific individuals before which the lobbyist has lobbied and with whom the lobbyist engaged in direct communications, this would be a significant expansion of current statutory requirements. Section 1-h of the Legislative Law sets forth requirements of lobbyists’ bi-monthly reports; its paragraph (b)(3) specifies that such reports shall contain “the name of the person, organization, or legislative body before which the lobbyist has lobbied.” Mandating the disclosure of individuals requires a legislative amendment to statute. Similar concerns apply to provisions of §943.12(f)(9)(i) relative to client semi-annual reports.

In our written comments on JCOPE’s two current regulatory proposals, we also reiterated concerns that we previously raised as to compliance mandates that depart significantly from statutory authority, and in doing so add unnecessary to compliance and reporting requirements:

§943.14(b)(2) and (c)(6) – The proposed rule adopts provisions of JCOPE’s reportable business relationship guidance that, in cases where a regulated “client” is an organization, provides that the term “client” term includes proprietors, partners, directors, or executive management of the organization. The proposed rule goes on to require that client organizations report on the business relationships of proprietors, partners, directors, or executive management of the organization. We previously objected to this language when proposed and adopted in the current JCOPE “reportable business relationship” guidance, and continue to do so. There is no statutory basis for this provision, as it goes well beyond the statutory definition of “client” found in the Lobbying Act, which is “every person or organization who retains, employs or designates any person or organization to carry on lobbying activities on behalf of such client.” It adds additional complexity and uncertainty to compliance obligations. It should be excluded from the final rule.

§938.3(c) - We again express our concerns about JCOPE’s implementation of the “source of funding” provisions of the Lobbying Act. In incorporating the new, lower statutory threshold of “each source of funding that has contributed over two thousand five hundred dollars from a single source that were used to fund the lobbying activities,” the proposed rule maintains JCOPE’s prior approach and requires the calculation, if not disclosure, of all contributors of that amount in total, regardless of what share of those payments is in fact used to pay for lobby expenses. While we supported and applauded the statutory amendments, adopted in 2016, that excludes the reporting of funds received for membership dues, JCOPE’s regulatory approach still requires an extensive amount of work to determine which members exceed the threshold.

This regulatory provision is of particular, if not exclusive, concern to trade associations and similar organizations. Generally speaking, trade associations receive little or no payments specifically for lobbying. Instead, their lobbying activities are funded from a portion of dues payments and other revenue sources. Our JCOPE filings for 2015 illustrate the incongruous outcome from JCOPE's compliance mandate, as we reported more than \$627,292 in reportable source of lobbying fund receipts, but just over \$363,000 in actual reportable lobbying expenses – not quite a two to one ratio. More important, since this type of calculation is not automated in our accounting system, our finance staff has to review thousands of separate transactions to identify payers of more than \$5,000 in aggregate in order to compile this source of funding report which, for 2015, included less than five hundred transactions and included reported amounts as low as \$6. Our compliance efforts will be made even more time consuming as the threshold falls to \$2,500.

As an alternative, we continue to support a workable, common-sense approach, under which JCOPE would use existing lobby expense data as reported to JCOPE to define the "source of funds" required to be disclosure. Specifically, an entity's ratio of reportable lobby expenses to total expenses would be applied to total payments from a single source. As example, for an organization whose ratio of lobbying expenditures to total expenditures is 25 percent, the organization would disclose the source, amount and date of payments exceeding \$10,000 in the aggregate. We urge that approach be adopted in JCOPE's formal rulemaking.

In closing, let me say that The Business Council appreciates the public's interest in meaningful and timely information about, to use JCOPE's language, "the people and entities behind those attempts at influencing decisions that can affect us all."

We devote substantial time and effort to meeting the requirements of the Lobbying Act. In doing so, we ask for clear compliance standards, regulations that are squarely based on statutory provisions, efficient reporting processes and technology, and a focus on meaningful information.

As always, we welcome the opportunity to discuss our comments and recommendations with Commission members and staff.

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