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Carol Quinn, Esq.
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Re: Proposed Comprehensive Lobbying Regulations -- I.D. No. JPE-34-17-00003-P

Dear Ms. Quinn:

As you know, Greenberg Traurig, LLP ("GT") is currently registered as a lobbyist with the New York State Joint Commission on Public Ethics ("JCOPE" or "the Commission") on behalf of approximately 100 clients. Moreover, GT provides legal counsel to many individuals, firms, corporations, and not-for-profit organizations with respect to the New York State and New York City lobbying laws and regulations. GT is committed to compliance with the lobbying law and regulations, and is proud of its history of working closely with the Commission to achieve common goals. We were pleased to submit comments regarding the staff draft version of these proposed lobbying regulations.

At the outset, it is important to acknowledge the yeoman's task that JCOPE – and in particular, the Commission's staff – undertook in drafting these regulations which, for the first time in the history of Commission's existence as well as the existence of all of its predecessor bodies, provides the public with formal notice of how it will interpret the extensive requirements of the Lobbying Act. Moreover, JCOPE should be commended for providing the initial round of informal comment and testimony, and for addressing many of the responses before issuing the current version of the draft regulations. Since then, GT has had the opportunity to review the revised draft regulations and develop further insights into how this may affect the regulated community, including clients. Accordingly, we are focusing these comments on only three substantive points:

1. The proposed Commission Salesperson test is inconsistent with the underlying statute and could result in a detrimental and chilling effect on entities doing business with New York State and its municipalities.

The New York State Lobbying Act expressly exempts from the definition of lobbying "the activities of persons who are commission salespersons with respect to governmental procurements." N.Y. Legis. Law § 1-c(c)(O). The Lobbying Act further defines a "commission salesperson" as

> any person the primary purpose of whose employment is to cause or promote the sale of, or to influence or induce another to make a purchase of an article of procurement, whether such person is an employee (as that term is defined for tax purposes) of or an independent contractor for a vendor, provided that an independent contractor shall have a written contract for a term of not less than six months or for an indefinite term, ***and which person shall be 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, promoted, influenced or induced***, provided, however, that the individual would be ineligible for this exemption if he or she receives a greater commission rate for sales made to government than for those sales made to comparable non-government entities, or if the individual engages in any other "lobbying activity."

N.Y. Legis. Law § 1-c(u) (emphasis added).

Statutorily, this exception is only available for those who have a job that has "the primary purpose of … cause[ing] or promot[ing]" governmental procurements. Thus, the potential for abuse of this provision is limited. The law is clear, however, that a salesperson is wholly permitted to receive a base salary and still be considered a commission salesperson. The only relevant direction that the statute provides with respect to compensation is that the individual's compensation must be "in whole or in part" based upon the sales made. This leaves no room for interpretation. As long as an individual whose job is primarily related to influencing procurements receives *some amount* of compensation that is calculated as a percentage of sales, and otherwise meets the statutory prongs, he or she will be exempt from registration as a lobbyist under the Lobbying Act.

Despite the clear direction in the statute, the proposed regulation would require that the employee's "[c]ommissions paid as portion of sales constitute, or is intended to constitute at least 50% of the person's total annual compensation." *Proposed* 19 NYCRR 943.8(c)(2)(i)(d). JCOPE's application of a minimum level of the compensation based on commissions in order to be eligible for the exception is unfounded. The statute is plain on its face that the compensation merely needs to include a percentage based on sales. Moreover, even if the statute was open to interpretation, it is unclear as to what substantive analysis JCOPE conducted to determine that 50% would be the appropriate threshold. Based on conversations with large national and multi-national corporations involved in varying fields of work, it has become clear that the 50% standard is not consistent with industry standards, and creating this standard now would be disruptive. There are many individuals who are truly commission salespersons in the eyes of their employers and industry standards, not to mention the statute, who, if the regulation was adopted as proposed, would inadvertently be turned into lobbyists. It is also important to note that some of these large entities' commission sales programs are national in scope. Thus, conformance with New York's requirements would require development of a new and different compensation system for their employees who do work in

New York. This would be particularly complicated for employees who serve multiple jurisdictions.

Worse yet, even if the companies are able to adjust their compensation systems to conform to the requirement of the regulations, if a commissioned salesperson has one or more bad years, such that their commission fell below the 50% threshold, they would lose the protection of the commission salesperson exception, and would need to be added to a Statement of Registration as lobbyists. Even more confounding, because their compensation was based on sales, these individuals could be accused of receiving compensation that "is contingent on the outcome . . . of [an] Attempt to Influence" a governmental procurement, a criminal offense.

In contrast with the foregoing analysis, the statute does leave some room for interpretation as to how much of the sales that percentage must be based upon: the law requires that the calculation be made based on "all or a substantial part of the sales" which the individual caused to occur. While "substantial part" is not defined, and the Commission could, therefore reasonably provide more clarity, the statute does not leave room for the Commission to interpret how much of the employee's total compensation needs to relate to a commission payment. Thus, in order to avoid the unintended consequences highlighted above and to remain consistent with the statutory framework, the proposed 19 NYCRR 943.8(c)(2)(i)(c) and (d) should be revised as follows:

> (c) The person receives a commission for **at least 50% of** sales the person has caused, promoted, influenced, or induced;
>
> (d) Commissions paid as portion of sales constitute[~~, or is intended to constitute at least 50%~~] **a part** of the person's total annual compensation;

2. ***The language modifying the statutory exception from the definition of Lobbying Activities for "non-lobbying legal services" is drafted too narrowly.***

As we noted in our earlier correspondence, the provision of the draft regulations pertaining to statutory exceptions generally appear consistent with the list of activities that shall not be considered "lobbying" pursuant to Legislative Law § 1-c(c)(A)-(Q). We commend the Commission for making revisions to address issues with the provisions of the regulation pertaining to "participation at certain public proceedings," "adjudicatory proceedings," and "response to requests for information/comments." However, further clarification is necessary regarding the exception provided for attorneys who are rendering non-lobbying legal services.

The regulation initially mirrors the statutory list of attorney activities that, although pertaining to government related actions, would not be considered lobbying. The statute and the regulation provide that "drafting, advising clients on or rendering opinions on proposed legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, Procurement Contracts, or tribal-state compacts, memoranda of understanding, or any other tribal-state agreements or other written materials related to Class III gaming," is not lobbying

activity as long as "***such professional services*** are not otherwise connected with State or municipal legislative or executive action on ***such*** legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, Procurement Contracts, or tribal-state compacts, memoranda of understanding, or any other tribal-state agreements or other written materials related to Class III gaming." Legislative Law § 1-c(c)(A); proposed 19 NYCRR 943.4(a)(1) (*emphasis added*).

Thus, for example, an attorney who represents Acme Corporation drafts a bill that will then be considered for introduction in the Legislature *will not* be considered a lobbyist for Acme Corporation, as long as that attorney does not seek to influence the introduction or passage of that bill. Similarly, when that attorney counsels Acme Corp. on the legal ramifications of terms of a governmental procurement, but does not assist in influencing the government's action with regards to that procurement, she would not be considered a lobbyist. It appears that as drafted the regulation would require that, if the fact pattern is changed such that Acme Corp.'s lawyer is a registered lobbyist for Acme Corp. because she drafted legislation and then met legislators to encourage them to introduce that legislation, with regards to other non-lobbying work that she performs for Acme Corp., she would have to report the compensation for all of that non-lobbying work, even though that work was completely unrelated to the lobbying activity and, but for the fact of her being registered as a lobbyist, would not have to be disclosed. This outcome is entirely inconsistent with the statute because the professional activity undertaken by Acme Corporation's outside counsel is not "connected" to the lobbying activity for which she was registered as a lobbyist. This exception is even more important where disclosure of the unrelated work could reveal sensitive information.

For this reason, it is imperative that JCOPE revise the proposed 19 NYCRR 943.4(a)(3) to clarify that just because an individual is already registered for a given client, that lawyer is not then required to treat all of the work for that client as Lobbying Activity, only the work that relates to "***such professional services [that] are . . . connected with***" influencing government action of some kind should be treated as lobbying. As such, there are scenarios where "a person [may] also provide services to the same Client which meet the test for Direct or Grassroots Lobbying," and still qualify for the "non-lobbying legal services" exception.

3. ***Administrative personnel should not be treated as lobbyists simply for facilitating a lobbyist seeking to engage in "preliminary contact" or otherwise supporting a lobbyist's effort to engage in other "direct contact."***

The proposed regulation appropriately highlights that individuals should not be treated as lobbyists simply for participating in "a meeting to provide clerical or administrative assistance" (*see* Proposed 19 NYCRR 943.6(b)(2)(ii)) or, when dealing with Grassroots Lobbying, if the individuals' roles are limited to serving as "[s]ecretaries, clerical, and administrative staff" (*see* Proposed 19 NYCRR 943.7(e)(3)(xii)). It would seem to logically follow that "secretaries, clerical, and administrative staff" should never be treated as lobbyists if those individuals' roles are limited to providing support services. Thus, for example, an administrative assistant to a lobbyist should not be deemed to have engaged in "preliminary

contact" if, on behalf of his or her supervisor, that assistant calls a Senator's office to schedule a meeting regarding legislation or facilitates a conference call between a government official and a lobbyist or client. Although this individual is instrumental in the lobbyist conducting his or her job, the administrative assistant is clearly not participating in strategy, planning, messaging, or any substantive aspect of the lobbying effort. However, because the contact is not in the context of "[a]ttend[ing] a meeting to provide clerical or administrative assistance," and pertains to direct contact rather than grassroots lobbying, there is no exception stated in the regulation. Thus, we recommend making a clarifying statement either in the definitional section of the regulation, or expand the exception in the proposed 19 NYCRR 943.6(b)(2) to cover clerical, administrative, or secretarial work that occurs outside of the context of a meeting.

CONCLUSION

Greenberg Traurig appreciates the opportunity to submit these formal comments, and trusts that the Joint Commission on Public Ethics will take them under consideration. We look forward to continuing to discuss these comments, and other issues that might arise, with the Commission, and continuing to be a strong partner in ensuring compliance with the State's lobbying laws.

Respectfully Submitted,

GREENBERG TRAURIG, LLP

Mark F. Glaser

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