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Comments of the New York Civil Liberties Union regarding Joint Commission on Public Ethics – *Comprehensive Lobbying Regulations* I.D. No. JPE-34-17-00003-P

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The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to provide comments regarding the above Proposed Rule Making by the Joint Commission on Public Ethics, adding a new Title 19 N.Y.C.R.R. Part 943 containing Comprehensive Lobbying Regulations.

The NYCLU, the New York affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 160,000 members and supporters. Our mission is to defend and promote the fundamental principles, rights and constitutional values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York. This mission includes advancing the interests of public transparency and accountability, and upholding the rights of all New Yorkers to freedom of expression, association, and petition, particularly on matters of public concern. In addition, the NYCLU is an interested entity in that it reports its own lobbying activity to JCOPE, pursuant to Article 1-A of the New York State Legislative Law.[1]

The NYCLU acknowledges the immense amount of time and effort that has gone into the Proposed Rule Making; its provisions represent the product of a truly comprehensive review, and a great deal of deliberation and opportunity for public input. As in the past, however, we urge the Commission to bear in mind the true scope of its statutory and constitutional mandates, whether regarding any part or the whole of its regulations; and to ensure that any activities unrelated to lobbying, or only incidentally related to lobbying, are not improperly swept within its regulatory grasp. Our comments are responsive to a handful of provisions that broaden the definition of regulated lobbying activity such that they appear to enlarge the Commission's regulatory authority beyond its mandate in light of constitutional protections for expressive activity.

[1] N.Y. Leg. Law §§ 1-a through 1-v ("the Lobbying Act").

In order to carry out its statutory mandate within constitutional constraints, the Commission must not include in its definitions of lobbying any activities outside the narrow constitutional definition of lobbying, whether direct or indirect.

The Lobbying Act begins with the following declarations:

> …The operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to appropriate officials their opinions on legislation and governmental operations;
>
> … To preserve and maintain the integrity of the governmental decision-making process in this state, it is necessary that the identity, expenditures and activities of persons and organizations retained, employed or designated to influence [government action] be publicly and regularly disclosed.

These declarations represent the two major public interests at stake: the right to weigh in on matters of public import, and the public interest in transparency and integrity in governance. In maintaining this equilibrium, though, the Supreme Court has drawn a very robust line: "contributions and persons having *only an incidental purpose* of influencing legislation" are outside the proper scope of government regulation of lobbying activity.[2]

It is well settled law that the right to petition government actors to take a position on proposed legislation is among the freedoms protected by the First Amendment.[3] In a representative democracy, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[4] Often this is accomplished via the established right of "like-minded persons to pool their resources in furtherance of common political goals"[5] – for example, by forming or supporting organizations that lobby in the collective interest.

However, over-regulation and compelled disclosure of this protected activity "can seriously infringe on privacy of association and belief guaranteed by the First Amendment."[6] Acknowledging this peril, the Supreme Court has held that regulation which compels disclosure of information about those engaged in protected First Amendment activities must be narrowly tailored in furtherance of a specific government interest, and must minimize any impact on protected speech and associational rights.[7]

The Court has accordingly concluded that the government can only regulate "lobbying in its commonly accepted sense – [] direct communication with members of [government] on pending or

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[2] *U.S. v. Harriss*, 347 U.S. 612, 622 (1954) (emphasis added) (internal quotation marks omitted).

[3] *See, e.g., Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (U.S. 1961).

[4] *Id*. at 137.

[5] *Buckley v. Valeo*, 424 U.S. 1, 22 (U.S. 1976).

[6] *Buckley*, 424 U.S. at 64.

[7] *Id*.

proposed [] legislation."[8] Thus, government regulation of lobbying and related disclosure obligations are consistent with the First Amendment only if they are limited to acts facilitating direct communication with elected officials to influence government action.

Unfortunately, by these long-held standards, the Lobbying Act is considerably overbroad on its face. Its language is similar in this respect to the language that the Supreme Court in *Harriss* found unconstitutional.[9] The Lobbying Act defines lobbying as "any attempt to influence the passage or defeat of any legislation" or any of a number of other activities aimed at influencing government actions which carry the force of law.[10] By its terms, New York's law does not confine itself to direct contact with government officials, as required by the Supreme Court in order to avoid constitutional invalidity. Rather, it seeks to reach any attempt "to influence the passage or defeat" of any legislation.

Importantly, in order to save the constitutional validity of the Lobbying Act, the prior Commission on Lobbying declared in an advisory opinion that it would not apply the New York statute "in any context outside the definition of lobbying contained in the *Harriss* case."[11] The constitutional validity of the Lobbying Act thus relies upon the current Commission's rules and processes, and the extent to which they confine themselves only to regulation of direct communications with officials and clear, orchestrated public calls to make such contact.

The Proposed Rule Making wholly incorporates the overbroad statutory definition of lobbying activities. The regulatory definitions of lobbying must therefore be narrowly drawn to comport with the constitutionally permissible scope of government regulation: organizational efforts to influence government action via direct contact with public officials, and choreographed grassroots campaigns that include a clear public call to contact those officials.

These limitations rest upon firm constitutional ground: the government's interest in disclosure is restrained, very specifically, to serving the public's interest in knowing who is trying to advance an agenda through lobbying activity; and anything beyond that cannot meet the strident court tests that apply to regulation of protected First Amendment activities. Taken together, these authorities draw the boundaries of the Commission's authority, subject to interpretation in its rule makings, of course.

The Proposed Rule Making greatly improves upon past drafts in its narrowed approach to many aspects of regulated activity. Unfortunately, it retains a few examples of regulatory 'mission creep' that appear to extend Commission authority over non-lobbying activity.

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[8] *Harriss*, 347 U.S. at 620.

[9] The Supreme Court declared overbroad a federal statute defining lobbyists as "any person…[who] receives money or any other thing of value to be used principally to aid [t]he passage or defeat of any legislation by the Congress of the United States." *Harriss*, 347 U.S. at 614.

[10] N.Y. Leg. Law 1-c(c)(i)-(x).

[11] *Commission of Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying*, 534 F. Supp. 489, 497 (N.D.N.Y. 1982).

A. Public Communications Categorized as Direct Lobbying

The Proposed Rule Making includes in its definition of Direct Contact

> … any communication or interaction directed to a Public official, including [] [p]ublic communications [] broadcast to more than just a Public Official when the clear intent is to reach a Public Official, including, for example, a billboard placed on a highway exit leading in to the Capitol or a rally held outside the Capitol[.]"[12]

This definition specifically excludes "communications set forth in section 1-c(B)(ii) of the Lobbying Act," which covers communication with the press. It also specifically includes billboards and rallies near government centers.

However, this impermissibly stretches the Commission's regulatory interest beyond the scope of its authority. Public communications that do not constitute direct contact cannot be categorically construed as direct lobbying merely because an unaddressed public official is likely to be exposed to them. Subsection (f) should be removed from the definition of Direct Contact at Part 943.6(a)(1)(i).

As the Supreme Court made clear in *Harriss*, the government cannot attempt to regulate as lobbying anything beyond "direct communications" with government officials, and orchestrated public appeals to contact them.[13] The fundamental element of 'direct lobbying' is direct, non-incidental contact with a public official. If that threshold is not met, the activity is not reportable direct lobbying subject to regulation.

In addition, defining a mass public communication as direct lobbying due to a speaker's "clear intent" to reach an un-named, unaddressed public official is unacceptably vague and invites controversy. Advocates must have a reasonable understanding of what activity is regulated. Where the boundaries of regulation are unclear, that regulation is likely to have an impermissible chilling effect upon protected expression about matters important to the public.

B. Grassroots Lobbying

The Proposed Rule Making impermissibly expands current definitions of grassroots lobbying. The Commission's existing definition of grassroots lobbying is as follows:

> A grassroots communication constitutes lobbying if it:
> 1. References, suggests, or otherwise implicates an activity covered by Lobbying Act Section 1-c(c).
> 2. Takes a clear position on the issue in question; and
> 3. Is an attempt to influence a public official through a call to action, i.e., solicits or exhorts the public, or a segment of the public, to contact (a) public official(s)[.][14]

However, the Proposed Rule Making incautiously expands upon this definition in three respects.

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[12] Proposed Rule Making at Part 943.6(a)(1)(i)(*f*).

[13] *Harriss*, 347 U.S. at 620.

[14] Joint Commission on Public Ethics, Advisory Opinion No. 16-01.

1) First, the Proposed Rule Making would broaden the definition of grassroots lobbying to include "solicitation, exhortation, or encouragement to the public, a segment of the public, or an individual to [] solicit, exhort, or encourage others to directly contact a Public Official."[15] However, the definition of grassroots lobbying should not include one who asks others to put forward their own grassroots calls to action. The definition of Call to Action should be amended to limit itself to solicitation, exhortation, or encouragement to the public, a segment of the public, or an individual to directly contact a Public Official

   As discussed above, the constitutionality of the Commission's regulatory scheme relies upon appropriately narrow definitions of lobbying.[16] Attempts to regulate such an attenuated contact are unlikely withstand constitutional muster; each regulated entity can be responsible only for its own public calls to action.

   It is easy to conceive of a circumstance in which a regulated entity urges an ally organization to consider starting its own grassroots campaign, but no contact with officials takes place because the ally does not do so. If there is no such contact, there can be no reportable lobbying activity. On the other hand, if the ally does put forward a grassroots call to action, then that ally is directly responsible for its own activity.

2) In the above subsection and others, the Proposed Rule Making includes in its definition of grassroots lobbying encouraging an "individual" to contact a public official, or making indirect contact "through another" single person.[17] One example of potential grassroots lobbying includes "[p]ersonal requests by a Lobbyist for another person to contact a public official."[18]

   This represents a new and unwarranted expansion of the existing definition of Grassroots Lobbying, which has been expressly limited to mass calls to action.[19] Such a conversation with an individual could not be deemed reportable lobbying unless that individual would be acting on behalf of the entity making the request, in which case it is a clear example of direct lobbying. The Proposed Rulemaking should be clarified to exclude a private suggestion or request to an individual that they take action from any definition of grassroots lobbying.

   Speaking with a single like-minded individual about a government action ripe for public input may seem like lobbying, under an overbroad standard that attempts to trace back any efforts to influence the opinions of others, and thus indirectly influence public officials. However, the constitutional standard at its broadest implicates only a public call to contact a public official expressing a position about a specified government action.

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[15] Proposed Rule Making at Part 943.7(b)(3)(i).

[16] *See* notes 8 and 11, *supra*.

[17] Proposed Rule Making at Part 943.7, §§ (a)(1); (a)(2); (b)(3)(i); (e)(viii).

[18] Proposed Rule Making at Part 943.7(e)(viii).

[19] *See*, *e.g.*, the Supreme Court's contemplation of a grassroots "letter-writing campaign" in *Harris* (347 U.S. at 621); and the Northern District Court's in *Commission of Independent Colleges and Universities* (534 F. Supp. at 496).

3) Finally, the definition of a Grassroots Lobbyist is somewhat counterintuitive. The Proposed Rule Making defines as a Grassroots Lobbyist the originator of the call to action, and specifically exempts the 'audience' of the call to action. Colloquially, however, the term 'grassroots lobbyist' most commonly applies to members of the public who take action. As above, if it is not clear whose and which activity is being regulated, the constitutionality of the Commission's regulatory scheme is jeopardized.

   The NYCLU recommends that the Commission reconsider using the term Grassroots Lobbyist in this way. It would be clearer to apply a term such as Grassroots Lobbying Originator to the regulated entity making the call to action. In the alternative, the Commission might simply opt to make the same statement in its principles on grassroots lobbying using existing terminology, rather than creating a new term that is not used anywhere else in its regulations.

C. Requests for Information and Public Comment

The Proposed Rule Making incorporates the Lobbying Act's exclusions from the definition of lobbying, including the exemption for those responding to requests for information or public comment.[20] The Lobbying Act exempts from regulation

> … [p]ersons who prepare or submit a response to a request for information or comments by the state legislature, the governor, or a state agency or a committee or officer of the legislature or a state agency, or by the unified court system, or by a legislative or executive body or officer of a municipality or a commission, committee or officer of a municipal legislative or executive body.[21]

This has historically been understood to exempt comments such as these, which are responsive to an administrative call for public comment, and appearances before government bodies upon notice of public hearing.

However, the Proposed Rule Making modifies this exclusion by including the word 'specific' such that only those "who prepare or submit a response to a *specific* request for information or comments" are exempted. The reason for adding this modifier is unclear, but it prospectively changes the scope of the statutory exemption, and could be read to include public comment and testimony in the definition of reportable lobbying.

Limitation of responsive public comments such as these, or of participation in public proceedings such as the Commission's hearings, by including such activity as lobbying would defy the clear terms of the Lobbying Act's exemption. That exemption appropriately provides for robust and unregulated responses to calls for public comment and community input. Any attempt to narrow that exemption would risk running afoul of strong protections for public participation in proceedings which concern matters of public interest.

[20] Proposed Rule Making Part 943.4(f)(1), adopting language of N.Y. Leg. Law § 1-c(c)(E).

[21] N.Y. Leg. Law § 1-c(c)(E).