LAW OFFICES
TRISTER, ROSS, SCHADLER & GOLD, PLLC
1666 CONNECTICUT AVENUE, N.W., FIFTH FLOOR
WASHINGTON, D.C. 20009
PHONE: (202) 328-1666
FAX: (202) 204-5946
www.tristerross.com

MICHAEL B. TRISTER
GAIL E. ROSS
B. HOLLY SCHADLER
LAURENCE E. GOLD
ALLEN H. MATTISON†
DAVID M. WACHTEL*
†ALSO ADMITTED IN MARYLAND
*ALSO ADMITTED IN CALIFORNIA AND MARYLAND

KAREN A. POST
Senior Counsel
JESSICA ROBINSON†
Of Counsel
NEIL C. WEARE
JOSEPH W. STEINBERG‡
‡ALSO ADMITTED IN MINNESOTA
Montana Office
LAURA L. HOEHN°
Of Counsel
°ALSO ADMITTED IN CALIFORNIA

October 16, 2017

By email to carol.quinn@jcope.ny.gov

Carol Quinn
Deputy Director of Lobbying Disclosure
NYS Joint Commission on Public Ethics
540 Broadway
Albany, NY 12207

Re: Proposed Comprehensive Lobbying Regulations

Dear Ms. Quinn:

Local 32BJ SEIU ("32BJ") respectfully submits these comments on the Joint Commission on Public Ethics' (the "Commission" or "JCOPE") proposed comprehensive regulations governing the registration of lobbyists, the disclosure of lobbying compensation and expenses, and disclosure of the sources of funds used for lobbying activities ("Proposed Regs").

Although the Proposed Regs would largely codify the Commission's current interpretation and enforcement of the Lobbying Act, NY Legis. L. § 1-A, *et seq.*, in some areas the regulations would expand the scope of regulated activities. In particular, the regulations treat as "Lobbying Activity"[1] some activities that are not currently considered reportable lobbying activities by many registered lobbyists (and unregistered persons), including "Social Media" activity by an organization and its individual employees pursuant to their job duties, even when such activity does not rise to the level of a "Social Media Campaign."

The Lobbying Act and the Proposed Regs require an individual to register as a Lobbyist if she or he is engaged in "lobbying" *and* expends, incurs or receives (or "reasonably anticipate[s]" expending, incurring, or receiving) more than $5,000 in combined reportable

[1] All capitalized terms in these comments refer to the capitalized defined terms in the Proposed Regs.

compensation and expenses for lobbying during a calendar year. *See* Lobbying Act at §§ 1-c(a) and (c), 1-e(3)-(4), and 1-h(b)(5); *see also* Proposed Regs § 943.10(b). Under the Proposed Regs, Lobbying Activity includes both Direct Lobbying and Grassroots Lobbying. *See* Proposed Regs, § 943.9. Direct Lobbying and Grassroots Lobbying both, in turn, encompass Social Media activities. *See id.* at §§ 943.6(c) and 943.7(f). So, under the Proposed Regs, an individual who engages in Direct Lobbying and/or Grassroots Lobbying, even if only through Social Media, and receives, expends or incurs more than $5,000 in a calendar year, must register and report as a Lobbyist.

Moreover, and in contrast, even if an individual never reaches the $5,000 registration threshold, the Proposed Regs require the individual's employing organization, variously as Client, Organizational Lobbyist and Principal Lobbyist, to file registrations and reports and identify the employee as an Individual Lobbyist to the Commission if the individual engages in a single Direct or Grassroots Lobbying communication, even if only through Social Media. *See id.* at §§ 943.6(c)(3); 943.7(c)(2), (e)(2)(ii) and (f)(2); 943.10(j)(3) and (k)(2); and 943.11(f)(2).

Because of the ubiquitous nature of Social Media, it would be uniquely challenging not only to determine the role any particular employee played in shaping a particular Social Media message, but also in tracking its use by individual employees, even if only in relation to their work. The burden of doing so is likely to consume an inordinate amount of effort on the part of both employers and employees, and otherwise chill public policy discussions by employees through Social Media in relation to – and apart from – their work. This burden is likely to far outweigh the minimal value the public may derive from the availability of a list of individuals who engage in Social Media activity. For these reasons, and as explained below, any final regulations that result from the instant process should not include Social Media activity as "Direct Lobbying," and if such activity is treated as lobbying at all, it should be reportable only by an Organizational Lobbyist and should not trigger the identification of individual employees as Individual Lobbyists.

Similarly, the Proposed Regs require that certain employees must be identified as Individual Lobbyists as a result of Lobby Days conducted by an employer. We recommend that Lobby Day costs be reported solely by the Organizational Lobbyist and not trigger an employee's treatment as an Individual Lobbyist.

The Proposed Regs also set out lobbying registration and reporting requirements for multi-party lobbying relationships, including coalition lobbying efforts. The definition of "Coalition" initially excludes affiliated entities that pool funds for lobbying purposes, which presumably encompasses labor organizations, such as 32BJ and its affiliated labor organizations, as well as trade associations and their member entities and affiliates. But, for reasons that are unclear, the Proposed Regs seemingly undermine this exclusion by specifying that *incorporated*

labor organizations and associations are not Coalitions. *See id.* at §§ 943.3(h)(3)(i)(a) - 943.3(h)(3)(i)(a)(1). Because there is no basis for differentiating between corporations and unincorporated associations with respect to the Lobbying Act, any final regulations should clarify that *all* labor organizations and trade associations are excluded from the definition of Coalition.

A. Direct Lobbying

Individuals who engage in Direct Lobbying may trigger the Lobbying Act's lobbying registration requirements. The Proposed Regs set out a definitional scheme for Direct Lobbying that, in most ways, generally comports with the Commission's current guidance and enforcement. But, the Proposed Regs' explicit inclusion of Social Media activities as Direct Lobbying and their treatment of Lobby Day participants as Individual Lobbyists unduly broadens the scope of reportable lobbying activity for Organizational Lobbyists and their employees.

Under the Proposed Regs, Direct Lobbying includes: (a) Direct Contact with a Public Official in an attempt to influence a covered legislative, executive, administrative, procurement or ratemaking action ("covered action"); (b) "Preliminary Contact with a Public Official to enable or facilitate an Attempt to Influence;" (c) certain Lobby Day activities; and (d) engaging in certain Social Media communications. *See id.* at § 943.6. Thus, all staff compensation for time devoted to these activities, as well as all amounts expended and expenses incurred for these activities, along with the subject matter of these communications, must be tracked for Lobbying Act registration and reporting purposes.

1. Social Media

Under the Proposed Regs, electronic communications, including e-mail, Social Media communications, and Internet Communications are included in the definition of "Direct Contact." *See id.* at § 943.6(a)(1). Although the Commission already treats "electronic advocacy" as a reportable expense, *see* Guidelines to the New York State Lobbying Act, JCOPE (Apr. 24, 2012), p. 34, the Proposed Regs cover a substantial breadth of Social Media activity as Direct Lobbying. Direct Lobbying includes not only sending a communication to a Social Media account owned or controlled by a Public Official or her staff, but also the creation of an electronic link to the Social Media account of a Public Official or her staff. *See* Proposed Regs § 943.6(c).

Engaging in Social Media can require an employee to be identified as an Individual Lobbyist for her employer. Sending a Public Official a direct message through Social Media, posting on a Public Official's Facebook page, or tagging a Public Official in a tweet or Facebook post when the tweet or post is done as part of an individual's job duties is "Direct Lobbying" and

prompts identification of the employee as an Individual Lobbyist if her Social Media contacts are not "part of a coordinated, mass Social Media Campaign conducted" by her employer.[2] *Id.* at 943.6(c)(3). This may be true even if that individual uses her own, and not her employer's, Social Media account. *See id.* at § 943.6(c)(5). But, a post on a person's own Social Media page that takes a clear position on a covered action is *not* Direct Lobbying, as long as it does not tag a Public Official. *See id.* But, because tags on Social Media often populate automatically, it may be difficult to avoid including tags altogether.

As a result, staff time, overhead, and any other costs attributable to a tweet or other Social Media activity must be accounted for and reported on lobbying disclosure reports. *See id.* at §§ 943.11(f)(8) and 943.12(f)(4). Likewise, the tagged Public Officials and the topics of the tweets or Facebook posts must be disclosed. *See id.* at §§ 943.11(f)(6)-(7) and 943.12(f)(8).

Social Media activity has become a routine method of public and personal interaction. Many people engage in Social Media in the course of – but not always as a requirement of – their employment. Indeed, for some people work and non-work discussions on Social Media may intersect, and it is sometimes difficult to distinguish whether the Social Media activity of an individual reflects the Social Media communications of her employer because it is a job requirement or because the individual shares her employer's policy positions, or for some other reason. Because of the ever-present nature of the Internet, the constant accessibility of Social Media, and the often ambiguous nature of Social Media activity, the treatment of those who engage in these activities as Individual Lobbyists is unduly burdensome and likely to chill public policy discussion and personal interactions about public issues.

If Social Media is to be treated as Lobbying Activity at all, it should not be treated as Direct Lobbying, but only as Grassroots Lobbying. Further, the Proposed Regs should be modified so as to eliminate the requirement that employees who engage in Social Media on behalf of their employer are identified as Individual Lobbyists, because such naming more confuses than enhances the public record as to how many lobbyists an employer actually employees and who they really are. Additionally, if Social Media is to be treated as Direct Lobbying, the mere tagging of a Public Official on Social Media should not result in a Direct Contact, especially as tags automatically populate on some Social Media platforms.

2. Lobby Day Activities

The Proposed Regs spell out what activities and costs are reportable as Lobbying Activity for Lobby Day events. A "Lobby Day" is defined as "select days used by organizations, often

[2] However, if an employer requires its employees to share its Facebook post and tag a Public Official as part of the employer's own Social Media Campaign, the individual employees who do so need not be identified as Individual Lobbyists. *See* Proposed Regs § 943.6(c)(3)(i).

annual, when lay members of an organization meet with Public Officials at various levels to advocate on issues relevant to the organization." Proposed Regs at § 943.3(j). Reportable expenses for a Lobby Day under the Proposed Regs include (but are expressly not limited to): (a) compensated staff time spent by employees planning the Lobby Day or attending Lobby Day; (b) "expenses related to placards, signs, t-shirts or other advocacy paraphernalia"; and (c) costs of transportation to and from the Lobby Day. *See id.* at § 943.6(b)(4). An employee of an organization must be identified as an Individual Lobbyist as a result of her Lobby Day activities if she makes Direct Contact with a Public Official as part of her job duties, and "speaks on behalf of the organization at the Lobby Day." *Id.*

By its very nature, a Lobby Day often involves many of an organization's employees. This includes those who do not ordinarily engage in lobbying activities and who neither necessarily expect nor are necessarily expected by their employer to make Direct Contact with a Public Official or to speak on behalf of their employer, even at a Lobby Day. But, the unpredictable nature of a Lobby Day may result in employees who never intend to – or whose employer never intends for them to – engage in these activities. This means that, under the Proposed Regs, an employee's presence at a Lobby Day event may unintentionally trigger her identification as an Individual Lobbyist. Rather than requiring every employee at a Lobby Day to track each interaction or guard against conversation when assisting the organization's members, 32BJ recommends that the Commission revise its Proposed Regs to maintain the requirement that the organization conducting the Lobby Day report all of the Lobby Day costs, including employee time, but not require the identification of employees as Individual Lobbyists due to their participation in the organization's Lobby Day. As with the identification of Individual Lobbyists who engage in Social Media, disclosing a list of every employee who participates in Lobby Day activities would clutter the public record with little or no meaningful information to the public regarding the nature or extent of an organization's lobbying.

B. Grassroots Lobbying Communications: Social Media

The proposed regulations covering grassroots lobbying also largely reflect the way the Commission has enforced the Lobbying Act. But, as with Direct Lobbying, the Proposed Regs extend the scope of regulated grassroots communications. The Proposed Regs treat Social Media communications as Grassroots Lobbying if they meet the three-part definition of "Grassroots Lobbying Communication."[3] *See id.* at § 943.7(e)(1) and (f). The Proposed Regs also provide that for purpose of an organization's reportable activities, an employee's Social Media activities are attributable to the organization "only when those activities are required as part of such member or employee's job duties." *Id.* at §943.7(f)(2). And, a particular employee will not be treated as an Individual Lobbyist if she did not participate "in shaping the message expressed in

[3] It is unclear whether Social Media communications that meet the three-prongs of the "Grassroots Lobbying" test but also tag a Public Official or her staff are to be treated a Direct Lobbying or Grassroots Lobbying.

the communication." *Id.* at §943.7(c)(2). We raise the same concerns regarding the ambiguity surrounding the impetus for any particular Social Media activity for the purposes of Grassroots Lobbying as for Direct Lobbying. And, for those employees who do engage in patently job-related Social Media activities, Social Media communications that constitute Grassroots Lobbying will require tracking time and compiling lists of issues mentioned on Social Media to ensure accurate reporting for both the individual employee and the employer. *See id.* at §§ 943.11(f)(8), 943.12(f)(4), 943.11(f)(6)-(7), and 943.12(f)(8).

As with the Direct Lobbying Social Media, 32BJ is concerned with the regulatory burden as a deterrent to engaging in public policy discussion through Social Media, and we recommend that if Social Media activity is to be treated as Grassroots Lobbying, Social Media activity conducted by an employee at the direction of her employer be reported only by the employer, and not require that the employee be identified as an Individual Lobbyist.

C. Definition of "Coalition"

The Proposed Regs require disclosure of Lobbying compensation and expenditures of Coalitions. *See id.* at § 943.3(h)(3). A "Coalition" is a "group of otherwise-unaffiliated entities or members who pool funds for the primary purpose of engaging in Lobbying Activities on behalf of the members of the Coalition." *Id.* at § 943.3(h)(3)(i)(a). However, a Coalition does not include "a not-for-profit corporation organized under section 501(c)(5) or (c)(6) of the Internal Revenue Code." *Id.* at § 943.3(h)(3)(i)(a)(1). This appears to be a drafting error. If § 943.3(h)(3)(i)(a) is intended, as it plainly states, to exclude from the Coalition definition all *affiliated* entities or members who pool funds for lobbying, then all incorporated *and unincorporated* labor organizations (501(c)(5)s) and trade associations (501(c)(6)s) that engage in such activities together with their member or affiliated entities are excluded. Thus, § 943.3(h)(3)(i)(a)(1)'s limitation to incorporated groups inexplicably undermines the intent of § 943.3(h)(3)(i)(a).

If, on the other hand, this is not a drafting error and §§ 943.3(h)(3)(i)(a)(1) and 943.3(h)(3)(i)(a) together are intended to relieve only *incorporated* trade associations and labor organizations (many of which are unincorporated associations) of the reporting obligations attendant to acting in coalition with other entities, then this distinction between incorporated and unincorporated entities appears arbitrary and serves no apparent purpose, particularly in relation to the Lobbying Act. The Commission should take care in any final regulations to ensure that an entity's disclosure obligations under the Lobbying Act are not determined on the basis of its status as a corporation or an unincorporated association.

D. Conclusion

For the reasons explained above, 32BJ respectfully requests that any final regulations resulting from the current proposal include the following modifications:

- Social Media should be excluded from the definition of Direct Lobbying, and, if treated as Direct Lobbying, the mere tagging of a Public Official on Social Media should not be considered a Direct Contact;

- All costs of any Social Media lobbying, including both Direct and Grassroots Lobbying, conducted by an employee at the direction of her employer should be reported only by the employer;

- Employees who engage in Social Media on behalf of their employer as part of their job duties should not be identified as Individual Lobbyists because of that activity;

- Lobby Day activities should not trigger Individual Lobbyist status; and

- Incorporated and unincorporated entities should be treated the same for purposes of the Lobbying Act.

We appreciate the opportunity to submit these comments on the Proposed Regs and thank you for your consideration of them.

Respectfully submitted,

Laurence E. Gold
Jessica Robinson
Trister, Ross, Schadler & Gold, PLLC
5th Floor
1666 Connecticut Avenue, NW
Washington, DC 20009
(202) 464-0353
lgold@tristerross.com
jrobinson@tristerross.com