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Re: Staff Draft Proposed Comprehensive Lobbying Regulations: Parts 942 & 943

Dear Mr. Levine:

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 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 are pleased to submit these comments regarding the proposed lobbying regulations.

***A. 942.3 Definitions***

1. *Definition of "affiliated."* The proposed definition of affiliated is overly broad and could result in capturing any entities that have "common shareholders [or] officers," regardless of the number of overlapping individuals or amount of shared ownership. Theoretically, this term could include entities where the only link is that some of the shareholders of one entity happen to also be shareholders of the other entity, even if such owners hold only a minute interest. This can easily be remedied by borrowing language from the Source of Funding regulations which defines "*affiliate relationship*" in 19 NYCRR 938.2(a) to include "[t]wo or more corporations, partnerships, organizations, or other entities . . . [with] any of the following relationships: parent/subsidiary; subsidiaries with the same corporate parent; national or regional organization and their local chapter(s); local chapters of the same national or regional organization."

2. *Definition of "designated lobbyist."* The current draft of the regulations include a definition of "designated lobbyist" that is too broad. This appears to be unintentional, as it is clear that the concept is to ensure that where a lobbyist is an entity, (i.e., an Organizational Lobbyist), the regulation seeks to capture more than just the employees of the entity who are authorized to lobby. While this is conceptually consistent with the statute, as drafted, natural people who are seeking to exercise their First Amendment rights and partake in what is commonly referred to as an organization's "lobby" or "advocacy day" would be required to be included on the entity's statement of registration and subsequent disclosure reports. Thus, we

would recommend revising the definition to, at a minimum, delete the reference to those individuals who lobby as a "volunteer, or by virtue of some other affiliated by non-employed status."

***B. 942.4 Exceptions***

By and large, this provision of the draft regulations appear consistent with the statutory list of activities that shall not be considered "lobbying" pursuant to Legislative Law § 1-c(c)(A)-(Q), and are unrelated to governmental procurement activity. However, the draft regulation tailors some of these exceptions more narrowly than the statute would otherwise provide. For example, the proposed regulation would exclude from the definition of "Lobbying Activities" certain communications that occur at "public proceedings," or as a "response to requests for information/comments." *See* 19 NYCRR 942.4(d), (f). Both of these exceptions include language that would appear to limit the application of the statute without a statutory basis.

The proposal provides that "participation at certain public proceedings" is not considered lobbying only if that participant does not "otherwise engage[] in Lobbying in connection with the subject of the person's participation in the public proceeding." *See* 19 NYCRR 942.4(d)(iii). This language conflicts with the statute which contemplates that the individual participating in the public proceeding will also be engaged in other activities, possibly including lobbying. The corresponding statutory provision states lobbying does not include "[p]ersons who participate . . . in public proceedings of a state or municipal agency *with respect to all participation by such persons which is party of the public record thereof and all preparation by such persons for such participation.*" *See* N.Y. Leg. Law § 1-c(c)(C) (emphasis added). The law indicates that individuals who engage in non-exempt activity would still have to disclose those efforts, but engaging in non-exempt activity in addition to the on-the-record communication would not vitiate the exception. The proposed regulation should be revised to eliminate 19 NYCRR 942.4(d)(iii).

Similarly, although it is clear that the law treats attempts to influence rate making proceedings as lobbying – just as it includes attempts to influence legislation or regulations – it is unclear that the law would treat communications during a ratemaking proceeding that are on the record (consistent with N.Y. Leg. Law § 1-c(c)(C)) as lobbying. Rather, only attempts to influence the ratemaking outside of the confines of the formal proceeding (e.g., ex parte communications with a commissioner) should be treated as a lobbying contact. Thus, we also recommend deleting the proposed 19 NYCRR 942.4(d)(iv).

Finally, proposed 19 NYCRR 942.4(f) should be amended. The general rule set forth in (f)(i) reflects the statutory language of Legislative Law § 1-c(c)(E). The limiting language in the proposed 942.4(f)(ii)(1)-(4) appear to be reasonable clarifications of how to apply the statute. There does not appear, however, to be any justification for item (5), which would require an already registered lobbyist to treat responses to requests for information as lobbying, and thus, it should be deleted.

***C. 942.6 Direct Lobbying***

1. *Definition of "preliminary contact."* The proposed regulation defines preliminary contact to "include[] any . . . [of the listed direct contacts to public officials] when the Lobbyist knows or has reason to know that the Client will *advocate* before the Public Official." 19 NYCRR 942.6(a)(ii) (emphasis added). This would seem to capture *any* advocacy, not just communications related to or in furtherance of Lobbying Activity. As the Commission recently opined, "[a]ny direct interaction with a public official in connection with an advocacy campaign, including preliminary communications to facilitate or enable the eventual substantive advocacy, constitutes lobbying." JCOPE, ADVISORY OPINION No. 16-01, p. 2. To harmonize the regulation with 2016-01, and to be consistent with the law, the draft definition of "*preliminary contact*" at 942.6(a)(ii) should be revised to include "any of the following, when the Lobbyist knows or has reason to know that the Client will advocate **on a matter covered by the Lobbying Act,** before the Public Official: . . ."

2. *Not direct lobbying pursuant to the proposed 942.6(b)(ii).* The proposed regulation aptly clarifies that an individual will not be considered to have engaged in direct lobbying if the contact with the Public Official is limited to providing "technical information or address[ing] technical questions." The Commission is to be commended for expressly including this exception in the draft but, as written, this language could be interpreted very narrowly. We, therefore recommend clarifying the meaning of this term to acknowledge that "technical information" could include communications by licensed professionals such as lawyers who are not participating in the communication for the purpose of advocating a certain outcome, but solely to offer a legal analysis; or skilled professionals such as actuaries and accountants, in addition to individuals commonly thought of in this fact pattern – such as architects and engineers. Similarly, it is important to acknowledge that there are times where an individual who attends a meeting solely to provide technical information or address a narrow technical issue may also be assisting the client in preparing or otherwise planning the most appropriate lobbying strategy. Providing such strategic advice, without advocating for or against the matter at issue is not considered to be Lobbying Activity, either under the Lobbying Act, the proposed regulations or Advisory Opinion 2016-01. The fact that the tactician had some limited interaction with government in order to address technical issues should not change the fact that this type of backroom services does not amount to an attempt to influence a public official. Thus, we recommend deleting the proposed item at 942.6(b)(ii)(2). Finally, it would also be appropriate to revise 942.6(b)(ii) in order to flesh out that individuals who are participating in a meeting for the purpose of assisting or shadowing a principal – e.g., taking notes, or serving as an intern who is there to learn, but not add to the discourse – should not be deemed to have engaged in direct lobbying.

### *D. 942.8 Procurement Lobbying*

1. *Definition of "Determination of Need."* The proposed regulation's definition of "determination of need" includes a list of government actions that may be indicia of such a decision. The list includes the issuance of a "request[] for information" ("RFI") as evidence that the government had made a determination of need. *See* 942.8(a)(v)(5). The State Finance Law explains that a "determination of need for a procurement" is generally identified by the issuance of "the public notification of the specifications, bid documents, request for proposals, or evaluation criteria for a procurement contract." *See* N.Y. State Fin. Law § 139-j(1)(e). RFIs are

issued to collect data in order to reach a conclusion as to whether there should be a determination of need. RFIs are not an announcement that the government intends to procure goods or services. For this reason, the reference to "requests for information" in the proposed 942.8(a)(v)(5) should be deleted.

2. *Definition of "Restricted Period."* State Finance Law sections 139-j and139-k include a clear definition of restricted period that was updated just this year pursuant to Part F of Chapter 57 of the laws of 2016. As a result of the amendments included in this year's budget, a restricted period now is considered to begin upon "the ***earliest posting, on a governmental entity's website, in a newspaper of general circulation, or in the procurement opportunities newsletter*** . . . of written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method provided for by law or regulation for soliciting a response from offerrs intending to result in a procurement contract with a governmental entity and ending with the final contract award and approval by the governmental entity and, where applicable, the state comptroller." *See* N.Y. State Fin. Law §§ 139-j(1)(f), 139-k(1)(f) (emphasis added). The emphasized language should be reflected in the proposed 942.8(a)(ix).

3. *Clarification of Commission Salesperson standard.* The proposed regulation clarifies that employees or consultants are to be treated as commissioned salespersons, and therefore exempt from the definition of a lobbyist, if the "[c]ommissions paid as portion of sales constitute at least 50% of the person's total annual compensation." *See* proposed 19 NYCRR 942.8(c)(ii)(1)(D). While we do not advocate for any fixed amount, if the Commission chooses to adopt a fixed amount, some flexibility in enforcing this requirement should be built into the proposed regulation. We suggest this because there may be years when an individual who truly is a commissioned salesperson has an off-year and, despite the fact that the salesperson expected and intended to receive at least the required percentage amount of annual compensation in commission, he or she did not have the sales revenue to justify the commission. In such a case, the employer should not be required to go back and change the individual's status for the purpose of complying with the Lobbying Act. Thus, the relevant provision of the proposed regulation should be revised to read as follows: "**The person reasonably anticipates that commissions** paid as portion of sales **will** constitute at least X% of the person's total annual compensation."

4. *Exception for Complaints and Appeals.* Consistent with the provisions of the Lobbying Act, the proposed regulation sets out a series of scenarios that would not be considered lobbying activity as the communication with government is limited to a complaint or appeal regarding a procurement. The proposed 19 NYCRR 942.8(c)(iii)(4) currently would only apply if the communication is "entered in the procurement record pursuant to section 163 of the State Finance Law." As the vendor or other individual filing a protest does not have control over whether the communication is entered into the procurement record, the proposed regulation should be clarified to read as follows: "Protests, appeals, or complaints to the State Comptroller's office during the process of contract approval, where the State Comptroller's office is required by law, provided that such protests, appeals, or complaints are made in writing and **are required to be** entered in the procurement record pursuant to section 163 of the State Finance Law."

5. *Technical Expert Exception to Procurement Lobbying.* The proposed 19 NYCRR 942.8(c)(ix) should be revised for the same reasons as set forth in comment C(2) above. Although this provision of the draft regulation is mirroring the language from Legislative Law section 1-c(a)(M), the Commission should take this opportunity to clarify that technical experts include lawyers, actuaries, and similar professionals.

***E. 942.9 Reportable Lobbying Activity***

1. *Definition of "Compensation."* The proposed definition should be revised so that it is clear that compensation paid to a Lobbyist is only considered "Compensation" if it is in exchange for lobbying related services. In other words, to the extent that the Lobbyist is paid by a client for non-lobbying services that are not in furtherance of the lobbying effort, the Lobbyist should not be required to disclose those payments. One way to clarify this would be to revise the definition at proposed 19 NYCRR 942.9(f) to read as follows: "Compensation includes all direct or indirect payments of salaries or other things of value **provided to a Lobbyist** in exchange for **Lobbying or services that are otherwise in furtherance of Lobbying Activity**.

2. *Third Party Filers and Coalitions.*

*A. Contractual Clients.* The proposed regulations would cover entities that are expressly retained to perform lobbying services, as well as those who are simply brokers whose only activity is to "retain[] the services of a lobbyist for the benefit of another." With respect to brokers, we question whether there is a public interest in knowing how much the broker is paid for the non-lobbying service of brokering the arrangement. The Lobbying Act makes no reference to disclosure of such expenses.

*B. Disclosures and Subcontractors.* The proposed regulations seek to clarify certain disclosure obligations when a lobbyist subcontracts some or all of the lobbying work. It is our understanding that the Commission does not intend to require Prime Lobbyists to file Client Semi-Annual reports with JCOPE if the only reason to file as a Client was due to the subcontract relationship. If that is the case, there should be an additional statement in the proposed 19 NYCRR 942.9(h)(ii)(1) clearly advising that although the Prime Lobbyist and Sub-Lobbyist must file bi-monthly reports, and the Client must file semi-annual reports, neither the Prime nor the Sub-Lobbyist is required to file semi-annual reports. Additionally, the regulations should clarify that although the Prime Lobbyist is required to report all of the Lobbying related compensation it receives from the Client – consistent with the retainer letter/statement of registration – the Sub-Lobbyist is only required to disclose the amount of compensation received from the Prime Lobbyist for the benefit of the services rendered for the ultimate Client.

3. *Coalitions.* If adopted, the regulations would establish a wholly new process and set of requirements for entities that are deemed "Coalitions." Without opining on the validity of, or statutory authorization for this process, we suggest that if the Commission is to proceed with this framework, two revisions must be made to the proposed 19 NYCRR 942.9(h)(iii). First, it appears that the definition of "coalition" is broad enough to capture a trade association or membership organization acting on its own, on behalf of its members. We do not believe this to be the Commission's intent. Therefore, we suggest that the language of 19 NYCRR 942.9(h)(iii)

be amended to clarify that the regulation will not apply to traditional, incorporated, trade associations or membership organizations unless the association or organization makes Expenditures in support of joint action with other entities. Additionally, proposed 19 NYCRR 942.9(h)(iii)(3) and (4) seem to be inconsistent and need to be harmonized to clarify that Coalition members will not be required to file Client Semi-Annual reports, unless the member is separately a client of a Lobbyist. Under the proposed regulation, contributions by a Coalition member could, nonetheless, trigger a Source of Funding disclosure obligation by the member entity. To the extent that the Commission proceeds with this approach, it would be necessary to determine how an entity – that is neither a Lobbyist nor a Client for purposes of the regulations or the Lobbying Act – could file a Source of Funding report.

***F. 942.10 Lobbyist Statement of Registration***

1. *Due Date for a Statement of Registration.* Although we understand that the Commission was seeking to assist the regulated community and make it easier for a Lobbyist to evaluate the due date for filing a Registration, proposed 19 NYCRR 942.10(e)(iv)(4) confuses the issue for entities with Employed Lobbyists. This item should be deleted.

2. *Contents of Statement of Registration.* Among the list of items that the proposed regulation would require a lobbyist to disclose is "any services to be provided in addition to Lobbying." *See* 19 NYCRR 942.10(k)(i)(1)(D). There is no statutory authority for disclosure of, and no public interest in knowing, what non-lobbying services might be provided to a client. At most, the proposed regulation should only require an acknowledgement of whether the Lobbyist is also providing non-lobbying services to the client. This is particularly the case for Lobbyists that are attorneys or law firms. There may be times when a law firm or attorney is prohibited to disclose representation of a particular non-lobbying client pursuant to the rules of professional conduct. As noted in the 2011 Report of the New York State Bar Association's Task Force on Ethics:[1]

> In certain circumstances, disclosure cannot be made without client consent. (*See* NY Rules of Professional Conduct Rule 1.6.) Confidential information "consists of information gained during or relating to the representation of a client, whatever its source, that is . . . likely to be embarrassing or detrimental to the client if disclosed." (NY Rules of Professional Conduct, Rule 1.6(a)(3)(b).)
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> In some circumstances, the disclosure of the attorney-client relationship is absolutely detrimental to the client. For example, an individual subject to a non-public law enforcement investigation, such as a criminal or professional discipline investigation could suffer reputational harm if it were revealed that the individual had engaged an attorney known to handle such matters. Disclosure of the representation would be suggestive of the investigation. Certain clients of a divorce lawyer may hope to resolve their marital issues outside the public eye or may not want their spouse to learn that they have engaged an attorney. The clients of a bankruptcy lawyer could be harmed if their financial difficulties, or their attempt at a workout, were known prior to a

[1] Full report available at: https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26662.

bankruptcy filing. Attorneys active in Family Court may find that they are prohibited from disclosing their clients' identities.

*See* NYSBA Report, pp. 22-23. The fact that the attorney or law firm is also a lobbyist providing lobbying services to this client does not eliminate these legal ethics considerations which, in certain instances, may make it impossible for the attorney to note that there are also non-lobbying services being provided.

3. *Exception for independent contractors.* There appears to be an error in the cite referenced in the proposed 19 NYCRR 942.10(k)(i)(3)(B). The correct internal reference to the exception for certain independent contractors being treated as Employed Lobbyists is subpart 942.3(g)(a).

***G. 942.11 Lobbyist Bi-Monthly Report***

1. *Late fees.* The proposed regulations aptly include a late fee schedule for Statements of Registration at proposed regulation 942.10(h). The Bi-monthly regulation does not appear to include a similar fee schedule. We believe that the Commission intended to include a comparable provision for Bi-Monthly reports, but 942.11 should be revised to clarify. Such additional language could mirror the provisions on late Fees and Penalties included for Client Semi-Annual Reports at the proposed 942.12(b).

2. *Names of lobbying targets.* The proposed 942.11(e) details the information that would need to be included in all bi-monthly reports. Among the details clarified, for the first time, is that the reports should include the specific names of individual lobbying targets, not just the titles or offices. *See* proposed 19 NYCRR 942.11(e)(vii). This should be revised to clarify that when dealing with the Legislature, the Lobbyist need only identify the elected official who is the target of the lobbying effort, and not detail the names of staff persons with whom the Lobbyist met. Similarly, to the extent that the target is the whole Legislature, or any committee of the Legislature, the Lobbyist should be permitted to identify the target as such. The issue is a bit more complex when the Lobbyist's target is a State agency or the Governor's office, but the Commission should clarify that not all individuals who participate in a meeting at a State agency would need to be listed on the JCOPE reports, only the ultimate decision maker.

3. *Look-back.* The regulations clarify that when a Lobbyist is first required to register for a client sometime after the January/February bi-monthly period, the initial disclosure report should include a look-back to ensure any relevant information connected to the lobbying effort is disclosed. The relevant provision should be amended, however, to clarify that only information that involved lobbying or was in furtherance of the lobbying effort needs to be disclosed. Thus, the revised 19 NYCRR 942.11(f) could read as follows: "If the first required Bi-Monthly Report filed by a Lobbyist for a calendar year is not the Report covering the January-February period (due March 15), the Report should disclose all **Lobbying Activity** [~~activities engaged in~~], Compensation received, and **Expenses** [~~expenditures~~] incurred."

### *H. 942.12 Client Semi-Annual Report*

The proposed regulations note generally that "[a]ll Compensation and Expenses associated with Lobbying Activity should be accounted for using accrual basis accounting, i.e., costs are reported in the period in which they are accrued." *See* proposed 19 NYCRR 942.9(d)(i). In order to be consistent with this accrual standard, the proposed 19 NYCRR 942.12(f)(iv) should be revised to read: "All Lobbying Compensation paid **or owed** to Lobbyists, including Retained Lobbyists, Employed Lobbyists, and Designated Lobbyists.

## CONCLUSION

Greenberg Traurig appreciates the opportunity to submit these 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,

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