NEW YORK ADOCACY ASSOCIATION
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To the staff of the Joint Commission on Public Ethics:

The New York Advocacy Association, an organization of government relations professionals, appreciates the invitation to comment on the JCOPE staff draft lobbying Regulations. Our members include both retained and in-house lobbyists, as well as compliance advisors.

In addition to our specific comments and questions, set forth below, we offer three overarching observations. First, while we appreciate the public concern regarding the influence of lobbyists, petitioning for the redress of grievances is not only fundamental to the free flow of information essential to democratic government, it is a First Amendment protected right and to the extent that disclosure may be a permitted burden, any regulatory scheme is subject to a strict scrutiny to assure that any such burden is minimized. We urge the Commissioners and staff to consider this at all times, to recognize that administrative convenience is insufficient rationale for requirements which make compliance more difficult, and to give deference to this principle in considering adoption and implementation of the draft Regulations and in all actions it takes.

Second, in order to survive a challenge on the grounds of unconstitutional vagueness, the statute and its implementing regulations must allow one to understand what behavior is expected of covered parties. In this regard, we applaud the staff initiative to propose Regulations, consistent with our previously stated concern about the process for and promulgation of guidances and Advisory opinions, which have their place but are no substitute for carefully defined and vetted Regulations.

Finally, these principles converge when consideration is given to the existence of two sets of statutes and sets of interpretations by virtue of separate adoptions of lobbying laws by the State Legislature and the New York City Council (and likely other jurisdictions). While differing statutory provisions may be beyond the scope of the draft Regulations to address, it remains a concern that lobbyists and clients are subject to both, with duplicative filing fees and overlapping and inconsistent reporting requirements. To touch on one example, the City Clerk has opined that testimony before a committee of the City Council does not fall under the City law definition of lobbying, as it is a public proceeding on the record to which the public is invited to testify. While the draft Regulations include a similar exception to the definition of lobbying, the same is not available if the testimony is associated with covered lobbying activity, a caveat not adopted by the Clerk. Consequently, we urge staff to confer with their counter-parts in the Clerk's office to try and interpret their respective statutes consistent with each other to the extent possible, but to also identify those areas when legislative change should be made to conform definitions and other provisions.

Specific comments follow.

942.3 Definitions

This memo addresses definitions in the order included in the draft Regulations. However, several parts of the draft Regulations contain definitions. For ease of reading, all definitions should be consolidated into one section.

The definition of *Affiliated* should be amended to be dependent on common control or ownership as to which common officers may be a manifestation, but not in and of itself determinative. For example, a state medical association and a local medical association should not be considered affiliated solely because one or more individuals are officers of both. This can be addressed by revising the order of the sentence: "*Affiliated* means two or more entities under common ownership or control through common shareholders, officers or other means."

Further consideration is required for the definition of *Designated Lobbyist*, given the exclusion of one who is also a *Retained Lobbyist*¸ if the lobbying activity performed in the former category is not the same subject as the lobbying activity performed in the latter. For example, a land use lawyer who is registered because zoning amendments are accomplished through a Resolution of a municipal legislative body, such as a City Council, should still be considered a *Designated Lobbyist* if participating in lobbying activities regarding funding of domestic violence programs as an officer of a charity or bar association.

The definition of *Individual Lobbyist* should be reviewed because of the placement of a comma after "counsels" ("…employees, counsels, or agents of colleges…"), to clarify whether "of colleges" refers to all positions listed or just "agents."

The definition of *Municipal Officers and Employees* should include a definition of "administrative board" differentiating between boards whose determinations have the force of law and those that are advisory.

The definition of *Public Official* should be clarified as to whether District Attorneys are considered State officials or Municipal officials.

The definition of *Responsible Person* should be expanded to allow for "any person with authority to bind the organization" as well as "and their authorized designees."

While recognizing that technology is rapidly changing and that new platforms enter the market regularly, there should be some definition of "social media."

Local lobbying should be a defined term indicating how it relates to municipal lobbying.

942.4 Statutory Exceptions

Clarify that the exception for persons engaged only in drafting, advising or opining applies to personnel within a firm which subsequently engages in lobbying if it occurred prior to being engaged to lobby. For example, a law firm is engaged to interpret a statute; as a consequence of that review, the client decides to seek a legislative change and engages the same law firm to

lobby. Neither the lawyer who did the initial analysis nor the analysis should be considered "connected" to the subsequent lobbying.

Clarify the definition of *News gathering and publication* to recognize *bona fide* Internet based news publications, as opposed to print or broadcast organizations. For example, the *New York Observer*¸ which was originally a printed newspaper now appears only digitally, but with substantially the same content. Similarly, there are any number of blogs which report on the activities of government, some of which are supported by paid advertising and some aren't.

Further, clarify that employees of qualified news organizations includes independent contractors, such as freelance writers and video-makers.

With respect to *Participation at certain proceedings*, the exclusion for "legislative branch public proceedings" does not appear to be authorized under the statute ("(C) Persons who participate as witnesses, attorneys or other representatives in public proceedings of a state or municipal agency with respect to all participation by such persons which is part of the public record thereof and all preparation by such persons for such participation;") which includes no such provisions and is beyond the scope of mere interpretation. So too as to the exclusion if the person appearing in the public proceeding otherwise lobbies on that subject. We note that this provision is contrary to the interpretation of the New York City Clerk with regard to testimony at City Council and other proceedings under its statute. While these exclusions may represent sound policy, they require legislative action. We further note that the phrase "legislative branch" is not defined and it is therefore unclear whether it is intended to apply only to the State Legislature or to municipal bodies such as City Councils.

The exclusion from the exemption for *Adjudicatory Proceedings* of adjudicatory proceedings before State or local legislative bodies is likewise not supported by the statute.

The provisions regarding *Response to request for information/comments* include limitations not contained in the statute, particularly with regard to the requirement that the person providing the response not otherwise be engaged in lobbying. "[A]n explicit request for information" is not defined; does it include a request by a covered official that the recipient meet the official to discuss a lobbying subject both generally and specifically or does it only include specific requests for factual information? The Regulation should make clear that the subsequent disclosure or publication of the information provided to the requesting official may be lobbying, but does not convert the initial response retroactively to lobbying if otherwise excluded.

With respect to *Licenses and Permitting*, please clarify if Special Permits are excluded if the determination to grant the same is made in the form of a Resolution by a municipal legislative body such as a City Council.

942.6 Direct Lobbying

With respect to *Direct contact*, as noted above, "social media" should be a defined term.

"Attendance at a meeting with a Public Official" should have an exclusion for support staff, similar to office support staff who book appointments, who attend solely to provide logistical support, such as operating the equipment for a PowerPoint presentation or carrying materials.

Also should be excluded are verbal language and sign language interpreters, although these may be reportable lobbying expenses.

"Technical information" and "technical questions" should be further defined. Is this exclusion available only to architects, engineers and scientists, or does it include, for example doctors? Does technical information include the conclusion or opinion of such persons as to the efficacy of a matter before the official? For example, does an engineer presenting traffic information in connection with a development project lose the protection of the exception by stating that the plan for new traffic signals will mitigate the project's impacts, based upon generally accepted technical methodology?

In connection with Direct Lobbying through social media, the provisions dealing with an account "owned or controlled" by a Public Official should be qualified to be those "known to be owned or controlled" by the official.

Please clarify whether posts to social media accounts invited by public official are excluded or included; examples being an online petition initiated by the public official or a request for comments on the official's website.

942.7 Grassroots lobbying

Clarify whether communications to members of an organization by that organization are included in the definition of *Grassroots Lobbying Communication*. Similarly, with respect to such communications to members if made by the organization's retained lobbyist or non-lobbyist advisor.

Clarify whether the phrase, "A person who participates in the delivery of a Grassroots Lobbying Communication *must* (emphasis added) be identifiable as a representative of or agent for the Client" is an element in determining whether grassroots lobbying has occurred or is a disclosure requirement. In other words, this phrase could be read to only include within the definition those who are identified as acting on behalf of a client, but could also be read as obligating the disclosure of the relationship of the representative to the client to the audience, which would appear to go beyond the scope of the statute. For example, an organization sends its membership a statement from a supporter not otherwise associated with the organization. Must the organization identify itself as the source of the communication and that the author is its agent? Is this the case if the person is a volunteer, or only if the person is compensated?

The Standard for Individual Lobbyists should be clarified with respect to a member of an organization who is the recipient of a social media communication and shares it with others, adding their own commentary of support, but is not compensated for the same.

Does the definition of Participation in Delivery provision that the person is "personally identifiable as a representative of or agent for the Client" references such identification in that specific communication or generally. For example, is the provision implicated where the person is known to be an officer or agent of the client, but the communication makes no reference to such status?

With respect to the Standard for the Attribution of social media activities for Organizational Lobbyists, the inclusion of activities "encouraged by the organization as part of a Social Media Campaign" appears unworkable unless the organization has actual knowledge of such activities.

942.8 Procurement Lobbying

For clarity, the exclusion from the restricted period provisions found in b(iii) for municipal agencies, except as to certain industrial development agencies and public benefit corporations, should be included instead in definition a(ix).

In general, both as to *Complaints and Appeals* and *Post-award Negotiations*, the exclusions for Offerors should include those acting on their behalf, such as attorneys. We note that the provisions for *Post-award communications* excludes from the exception a registered Lobbyist because of that person's *Procurement Lobbying Activity*, which by the terms of the draft Regulations excludes *Post-award Negotiations, Submissions of bids, Public communications to agencies* and other items. Therefore, none of these activities should exclude a person engaged in those activities. For example, Client engages a law firm to assist in responding to a Request for Proposals from a covered entity for a covered transaction. The law firm is registered as a lobbyist for the client by virtue of other matters. The law firm assists in developing the bid with respect, for example, to the terms of a ground lease for real property, is present during Offeror interviews to elaborate on the same, and participates in negotiating the provisions of the same post-award. None of these would be considered lobbying activities by the Offeror and should not be viewed as lobbying activities by the law firm, even if they are otherwise reporting other lobbying activity, so as not to burden or inhibit the flow of information necessary for the procurement.

With respect to *Benefits and Incentives*, while we recognize that the draft Regulation tracks the statute, the conversion of a mere inquiry for factual information and nothing more into lobbying activity when made by a registered lobbyist- which necessitates numerous reports by both the client and the inquiring lobbyist regardless of whether the lobbyist is compensated or not- is constitutionally suspect as burdening speech without any compelling state interest, in as much as no effort to influence a government determination is implicated, and the Commission should request the Legislature to amend such provision.

942.9 Reportable Lobbying Activity

Consistent with our earlier comments regarding social media and grassroots lobbying, the statement that "Lobbying Activity that includes only Grassroots Lobbying may not require the identification or disclosure of any Individual Lobbyist" should be elaborated on and examples provided.

With respect to Accounting Methods, fees should be considered incurred when billed, at least with respect to hourly billings. For example, if a firm for whatever reason does not bill a client in a given month for services within a reporting period, they are not incurred until the reporting period in which they are billed, although the lobbying activity would be reportable in the prior period as to subjects and targets. We note that the statutory reference is to fees incurred or paid, not to fees accrued.

As further discussed below, the Regulations should explicitly provide that a write-off of a bill, or a suspension of billing (for example, when the Legislature is not in session) does not require amendment of the lobbying contract or authorization; disclosure of the actual amounts incurred or paid is sufficient.

The requirement that reports be amended to reflect a subsequent write down, write off or other modification is an administrative burden that does not advance the public interest in as much as the absence of such requirement can result only in over-reporting and not under-reporting. For example, lobbyist bills client for services pursuant to their agreement, client fails to pay, all required reports are filed reflecting the billed amount, and months later the parties agree to a discount. To require the amendment of numerous reports except when the relationship has ended is burdensome, especially for small organizations. We suggest that the same is unnecessary, but if desired for some reason, the filing of a report by the lobbyist simply stating the amount of the write-off in a year-end report should suffice.

With respect to Expenses, the provision for disclosure of Non-lobbying staff salaries should be applicable solely to organizations that lobby on behalf of themselves and not those who lobby on behalf of Clients other than themselves. The purpose of the lobbying law is to inform the public who is spending what to influence government determinations. In the case of a retained Lobbyist, this is accomplished by reporting the fees incurred or paid to that Lobbyist. The internal allocation of support staff salaries adds nothing to that, as their compensation is merely one more expense of the lobbying firm, together with non-reportable expenses such as rent. This provision is particularly unworkable for organizations which perform both lobbying and non-lobbying services with professionals who themselves do both and whose support staff may vary depending on, for example, vacations.

The regulations should clarify that reportable compensation does not include fringe benefits, or at least non-taxable fringe benefits.

While we appreciate staff's efforts to clarify the treatment of Third Party Fliers, we believe that the draft Regulations require further consideration and clarification. We highlight two areas.

First, as previously noted, certain land use actions may fall within the definition of State lobbying because the final determination is by Resolution of a City Council. It is not unusual in a real estate development project for a client to act through multiple entities. For example, a common scenario would be an organization which may be known by a corporate name (or a trade name) to create a special purpose entity for the acquisition and development of the property which has a name that does not indicate affiliation, while the expenses of the venture, including lobbying expenses are paid by yet a different entity (such as a hypothetical "Developer Organization", "123 Main Street LLC", and the "DO Operating Company"). The New York City Clerk has accounted for such situations by allowing registration and reporting by, for example, Company A on behalf of Company B and Company C. JOCOPE should do the same in some form.

In the course of this, JCOPE should clarify that the post-entitlement increase in value of the property is not a contingent fee to the owners of the entity in which the real property interest is held. We recognize that this differs from the opinion prohibition on a lobbyist accepting stock

which may increase in value as a result of legislation, but we think the circumstances are different (and that that opinion should be reconsidered in any event in light of the advent of the "start-up" economy). Otherwise, any real estate company which registers as its own lobbying organization would be in violation solely by virtue of it obtaining entitlements, regardless of whether market conditions allow them to realize any theoretical increase in value at that moment in time. This could not be what the drafters of the statute had in mind, and nothing in the legislative history suggests that this was an intended outcome.

The definition of *Coalition* requires considerable analysis and elaboration, including providing examples of "common activities" and they should be accounted for. For example, it is our understanding that staff did not intend to cover individuals who participate in "lobby day" visits to the State Capitol or City Halls, and therefore needs to make clear that the value of such efforts is not included in the 90% threshold calculation which would determine that the organizing entity is a *Pass-through* coalition.

942.10 Lobbying Statement of Registration

The comment above, regarding the need for additional clarity with respect to *Coalitions*, relates to the requirement that once "a Lobbyist has exceeded the cumulative $5,000 threshold, the Lobbyist must file a registration for any Client for whom he [sic] lobbies, regardless of Compensation or Expenses as set forth in b(iii)." For example, a company may be registered as a lobbying organization with itself as client because it engages in permitted procurement lobbying for itself, as a lobbyists because some of its activities are considered lobbying activity for clients, or both. This should not require the company to file a registration listing a Coalition of which it is a member as a Client solely by virtue of the company's support of the Coalition's activities if they would not otherwise be required to if the company was not registered as a lobbying organization.

The Regulations should address situations in which a client verbally commits to engaging the lobbyist but does not obligate itself to the engagement by returning a signed agreement or authorization (or in some cases making an initial retainer payment). As long as no lobbying actually occurs, or no advance payment for lobbying services is received, the obligation to register should not be triggered until the signed instrument is received; the verbal statement does not in and of itself create a reasonable expectation that a lobbying engagement is about to be underway, given the number of situations where such a commitment is subject to ratification by others in an organization, where funds for the lobbying must first be secured, or where a client has second thoughts because of the anticipated costs, any of which could result in a decision not to engage the lobbyist which is not communicated until after the timely registration window has closed.

Thus, the requirement that a "Required Statement of Registration must be filed within the Due Dates regardless of whether there is a written authorization signed by the Client…or a written agreement or retainer of employment signed by both parties" is unfair and should be eliminated, particularly because the filing of such a Statement of Registration without "an authorization or agreement to Lobby will be deemed late, and subject to the late fee schedule" in the draft Regulations. Simply put, in the real world, a lobbyist does not "reasonably" expect to lobby until

the client contractually obligates itself to the engagement, pays consideration for it, or the lobbyist actually engages in lobbying activity while waiting for the engagement letter to arrive.

The draft Regulations allow for no filing fee if the lobbyist will not exceed $5,000 in compensation. This is beneficial for circumstances, for example, where the lobbying is being done pro bono, but does beg the constitutional question of why registration is required at all if no funds are being expended by the client to influence the lobbying determination. Having said that, we assume that the Commission's electronic filing system will capture such situations so that a registration not required to be accompanied by a filing fee is not held up because no fee is paid.

Consistent with comments previously provided above, an agreement to suspend a lobbying engagement or to waive or write-down fees previously incurred is appropriately reflected in the amount of compensation reported as incurred or paid in the periodic reports should not require an amended Statement of Registration, whether before or after termination of the engagement.

942.13 Lobbyist Disbursement of Public Monies Report.

The reference in the first sentence to Government Procurement "(as defined in Part 942.7)" appears to be in error and is presumed to be a reference to draft Regulation 942.8.

The draft Regulations should clarify whether they apply to the disbursement of funds by municipalities or only State entities.

Finally, we recognize that the draft Regulations reflect staff's recommendations, and are subject to review and revision prior to a determination by the Commissioners whether to adopt the same and proceed with formal comment and adoption under the State Administrative Procedure Act. Given that this process will likely proceed well into next year, assuming the Commissioners authorize the same and then adopt Regulations, and the need to educate lobbyists and client regarding the provisions thereof, we strongly recommend that a schedule be adopted which would allow for an effective date of January 2017, and that no retroactive requirements be imposed.

Thank you for considering the positions set forth above, which will be supplemented by testimony at the upcoming public hearing. We look forward to continuing our dialog with the staff regarding these important matters and are available to respond to any questions or comments.

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