



November 11, 2016

Martin Levine
Director of Lobbying and FDS Compliance
Joint Commission on Public Ethics
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Re: Comments on staff draft Lobbying Act regulations

Dear Mr. Levine,

Lawyers Alliance for New York submits these comments regarding the staff draft Lobbying Act regulations.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers. Among the services we provide to our clients is assistance complying with the Lobbying Act.

We provide these comments to draw particular attention to the effect that these proposed regulations will have on small nonprofit organizations. Many of our clients have no in-house lawyers and no dedicated compliance staff. In fact, many have no dedicated administrative staff – everyone in the organization is involved in program delivery, and time spent on compliance takes time away from delivering those programs. In order for these organizations to provide the transparency the Lobbying Act seeks to achieve, it is essential that compliance with the Act be as simple and efficient as possible.

As we describe below, the proposed regulations take some important steps towards reducing the unnecessary burdens of compliance. At the same time, the regulations regarding “beneficial clients” and coalitions exceed JCOPE’s authority and add to those burdens by purporting to regulate people and entities that have neither engaged a lobbyist nor accepted money to lobby on behalf of another person or entity. The regulations also overstep JCOPE’s authority by regulating the personal social media accounts of members and employees.

I. The proposed regulations will streamline and improve compliance in important ways.

We applaud JCOPE for proposing to allow an organization that acts as its own lobbyist to file only one set of reports, rather than two separate sets of reports, as both a lobbyist and a lobbying client. This will eliminate the unnecessary requirement that every six months such organizations must transcribe the information from their last three lobbyist reports into a separately filed, entirely redundant Client Semi-Annual Report. This redundant reporting does not increase transparency. Eliminating it will free up time spent by nonprofit staff, which could be better spent delivering charitable programs. It will also allow JCOPE staff to stop spending time monitoring whether multiple, duplicative reports have been filed, and instead focus their attention on higher priorities. Notably, this change will align JCOPE's practice with that of the New York City Clerk, which also regulates lobbying activity by many of the organizations regulated by JCOPE.

We also applaud JCOPE for proposing to eliminate the requirement that a client that has filed a Semi-Annual Report for the first six months of the year but does not meet the \$5,000 reporting threshold for the entire year must still file a Semi-Annual Report for the last six months of the year. However, we urge JCOPE to similarly allow an organization that is its own lobbyist to terminate its registration, and stop filing reports, if at any point during a calendar year it concludes that it is unlikely to reach the \$5,000 expenditure threshold during that year. Many of our clients register as a lobbyist at the beginning of a two-year registration cycle out of an abundance of caution. Then, they must file Lobbyist Bi-Monthly reports for the next two years even if they engage in only a minimal amount of lobbying because they change priorities, a hoped-for opportunity fails to materialize, or they eliminate their entire advocacy program. Allowing an organization that will never reach the \$5,000 reporting threshold to stop reporting would be a sensible way to reduce unnecessary burdens without reducing transparency.

II. JCOPE lacks authority to regulate people and entities that have neither engaged a lobbyist nor accepted money to lobby on behalf of another person or entity.

As the legislature recognized when it enacted the Lobbying Act, association for the purpose of petitioning government is at the core of the First Amendment. Legis. Law § 1-a. As a result, lobbying disclosure regulations are subject to exacting scrutiny, which requires “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ government interest.” *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010). *See also National Ass’n of Mfrs. v. Taylor*, 582 F.3d 1, 10 (D.C. Cir. 2009). The Supreme Court’s holding in *United States v. Harriss* that the federal lobbying disclosure act then in effect passed constitutional muster was premised on the Court’s finding that the law sought “only to know who is being hired, who is putting up the money, and how much.” 347 U.S. 612, 625 (1954). That is also the purpose of New York’s Lobbying Act. Legis. Law § 1-a; *Comm’n on Indep. Coll. & Univ. v. N.Y. Temporary State Comm’n on Regulation of Lobbying*, 534 F. Supp. 489, 494-5 (N.D. N.Y. 1982). A federal district court’s 1982 rejection of a constitutional challenge to the predecessor of New York’s Act relied on that purpose, and on the court’s interpretation that the law did not cover “any discussion of the merits of any

governmental action that *may* ultimately affect or influence such action.” *Comm’n on Indep. Colleges & Univ.*, 534 F. Supp. at 496 (emphasis in original). However, several aspects of JCOPE’s proposed regulations go farther, apparently requiring disclosure by and about people who are merely the passive beneficiaries of lobbying by others, or who merely converse and associate with lobbyists and their clients. These aspects of the law, which are described below, would not survive strict scrutiny and are therefore unconstitutional.

A. Beneficial Client

We urge JCOPE to remove the requirement that a lobbyist must disclose any “individual or organization on whose behalf Lobbying Activity is conducted,” even if there is no money changing hands. 942.3(c) & (d); 942.10(k)(i)(7) (lobbyist registration); 942.11(e)(iii) (bi-monthly report). The proposed regulations imply that such individuals or organizations – deemed “beneficial clients” – may also be required to report as clients if they reach the expenditure threshold through other lobbying activity. *See* 942.3(d) (defining “client” as including “beneficial clients”).

This requirement would capture people and organizations with no intention of engaging a lobbyist, and even people who have no idea that anyone is lobbying to help them. Community-based organizations often advocate on behalf of an entire neighborhood (“the people of East Flatbush”), age group (“senior citizens”), or other type of demographic group (“single mothers”). Community-based organization also often advocate for positions that would benefit specific entities or individuals if their positions are legislatively or administratively adopted, but do so without the knowledge of those individuals and entities. It would be impossible and unnecessarily intrusive for a lobbyist to identify each member of these groups.

Likewise, a person or entity that has reached the expenditure threshold because of its retention or employment of a lobbyist could be required to report as a “beneficial client” of a different lobbyist they have never met. For instance, Lawyers Alliance is registered as a lobbyist on its own behalf. We advocate for laws and policies that will benefit small charitable nonprofit organizations. It would be impossible for all such organizations to report our activities on their Client Semi-Annual Reports, when many have no relationship with us.

B. Coalitions

JCOPE proposes to require lobbyists to identify coalitions on whose behalf they are lobbying, to require clients to identify any coalitions acting as “third parties” to the client’s lobbying, and to require coalitions that report as a lobbyist or client to disclose their members. As an initial matter, we strongly urge JCOPE to work with the New York City Clerk to develop congruent rules regarding coalitions. Otherwise, the many organizations regulated both by JCOPE and the City Clerk will have to report their lobbying in coalitions in one way to the State and another to the City, resulting in a jumble of contradictory information that will confuse, rather than enlighten, anyone trying to glean useful information from lobbying reports.

These congruent rules should stay within JCOPE's authority under the Lobbying Act, which regulates lobbyists and their clients and does not extend to "third parties." Thus, JCOPE should remove the requirement that a lobbyist must identify a coalition as a "party" to lobbying activity. *See* 942.11(e)(iv). Under the Lobbying Act, a lobbyist is only required to identify a coalition as a client if the lobbyist has actually agreed to lobby on behalf of the coalition (in which case the coalition will be the lobbyist's client). *See* Legis. Law § 1-c(b) (defining a client as "every person or organization who retains, employs or designates any person or organization to carry on lobbying activities on behalf of such client"). Likewise, JCOPE should remove the requirement that a client must identify a coalition as a party to the client's lobbying. *See* 942.12(f)(vi). The Lobbying Act requires a coalition that retains or acts as its own lobbyist to report as a client and/or lobbyist; it does not require any other client to report that coalition as a third party. Legis. Law § 1-j(b) (describing the contents of a Client Semi-Annual Report).

Finally, the Lobbying Act does not grant JCOPE authority to require a coalition to disclose its members, or to count as a lobbying expenditure any contribution to a coalition that expends more than 90% of its expenditures on lobbying. On the contrary, the Legislative Law's source of funding disclosure provisions require the disclosure of the identity of members and their contributions only under very specific circumstances. A coalition must disclose certain donors only if either: 1) the coalition is a 501(c)(4) entity that spends at least \$15,000 on lobbying in a 12-month period, and the coalition's lobbying expenditures constitute at least 3% of the coalition's total expenditures during that period, Legis. Law §§ 1-h, 1-j, or 2) the coalition is a 501(c)(3) organization that contributes at least \$2,500 to such a 501(c)(4) entity. Exec. Law § 172-e. Beyond that, there is no statutory authority for JCOPE to require disclosure of a coalition's members or to treat the members' contributions as a lobbying expenditure.

Moreover, JCOPE's definition of a coalition as one whose "otherwise-unaffiliated entities or members agree to engage in common activities which include, but are not limited to, acting as or engaging a Lobbyist on behalf of all members of the Coalition" is too broad. *See* 942.9(iii). It could cover mere conversations, without any exchange of money. For instance, it could cover community-based organizations that talk to each other from time to time about shared goals or strategies but have no formal agreement allowing one to represent the others and do not act in concert to retain a lobbyist or explicitly designate a coalition member to act in that capacity. Indeed, Lawyers Alliance often hears from nonprofit organizations attending these sorts of informal groups that, because they want to avoid lobbying, recuse themselves from any conversations about lobbying although they otherwise remain a part of the group. Identifying an organization as a member of a lobbying coalition merely because the organization attends a meeting to exchange information could jeopardize the organization's tax exempt status.

III. JCOPE lacks authority to regulate the personal social media accounts of members and employees.

We urge JCOPE to amend the proposed regulations so that they do not attribute the purely personal social media activities of members and employees to an organization merely

because the organization encourages those activities. The proposed regulations would attribute the “personal social media activities of an individual member” of an organization to that organization “when those activities...are encouraged by the organization as part of a Social Media Campaign.” 942.7(g). This is unworkable and unnecessary. It is unnecessary because there is no expenditure associated with a member spending his or her own time tweeting or posting on Facebook. It is unworkable because it is impossible (and unnecessarily intrusive) for an organization to track its members’ social media posts.

The proposed regulations would also attribute an employee’s personal social media activities to an organization “when those activities...are encouraged by the organization as part of a Social Media Campaign.” 942.7(g). If an employee’s posts are related to the person’s job, then they already constitute a business expense of the organization because, as a matter of employment law, an employee who “volunteers” for job-related duties must be compensated for that work. 29 C.F.R. § 553.103. However, if the posts are unrelated to the person’s job, then the fact that they were encouraged by the organization should be irrelevant. A janitor who works at an advocacy organization should not have to report his personal social media use to his employer merely because he agrees with his employer’s views and posts those views on his personal social media accounts, without the knowledge of his employer.

IV. Additional issues

942.7.d: We urge JCOPE to clarify what is meant by: “A person who participates in the delivery of a Grassroots Lobbying Communication must be identifiable as a representative of or agent for a Client.” Does this mean that an activity constitutes grassroots lobbying only if a person is identifiable as a representative or agent for a client? Or does it mean that a person is barred from engaging in grassroots lobbying unless she identifies herself that way? There is no basis in the Lobbying Act for the latter interpretation, which would raise serious First Amendment issues.

942.10.e.iv: This provision, which lists the dates by which a lobbyist must register, should make clear that a lobbyist is not required to register until and unless it reasonably anticipates reaching the \$5,000 threshold.

942.10.h: This provision, regarding late filing fees, should include language from p. 31 of JCOPE’s current guidelines regarding JCOPE’s discretion to waive fees.

942.10.k: This provision should acknowledge that in lieu of publicly disclosing an employed lobbyist’s salary an organizational lobbyist may simply say that it anticipates spending \$5,000 during that calendar year, as JCOPE’s sample “Authorization Letter (Employee)” currently allows. *See*

<http://jcope.ny.gov/forms/lob/samples/Sample%20employee%20authorization%202016.docx>

Conclusion

We urge JCOPE to revise its draft regulations along the lines discussed above. Thank you for considering these comments. Please do not hesitate to contact me at (212) 219-1800 x283 or label@lawyersalliance.org with any questions.

Sincerely,

A handwritten signature in black ink that reads "Laura K. Abel". The signature is written in a cursive, flowing style.

Laura Abel
Senior Policy Counsel