



NYCLU
NEW YORK CIVIL LIBERTIES UNION

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Comments of the New York Civil Liberties Union

regarding

Joint Commission on Public Ethics Source of Funding Regulations

February 8, 2012

The following comments are submitted regarding the Joint Commission on Public Ethics (JCOPE) Source of Funding Disclosures on behalf of the New York Civil Liberties Union. Founded in 1951, the New York Civil Liberties Union (NYCLU) is a not-for-profit, nonpartisan organization with eight chapters and 50,000 members across New York State. The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. Members of the NYCLU staff are registered lobbyists pursuant to New York's Lobby Act,¹ and the NYCLU reports as a lobbying "client."² The NYCLU is thankful for the opportunity to comment on the Source of Funding Disclosures to facilitate the development of JCOPE's regulations.

I. Introduction

It is well settled that the right to petition the government 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

Equally well established is the right to make contributions in order to advance one's beliefs, and the right of "like-minded persons to pool their resources in furtherance of common political goals."⁵ However, the compelled government disclosure of personal information about individuals who make financial contributions to lobbying organizations "can seriously infringe

¹ N.Y. Leg. Law 1-a, *et seq.*

² *See* N.Y. Leg. Law § 1-j(4).

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).

on privacy of association and belief guaranteed by the First Amendment.”⁶ Any attempts to compel the disclosure of information about people 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

Existing New York State law requires organizations engaged in lobbying activities to submit twice-yearly reports on the names, addresses, and compensation provided to individuals who engage in lobbying activities.⁸ The Joint Commission on Public Ethics has proposed a new set of disclosure requirements which will additionally require any organization that engages in lobbying activities to disclose the names, addresses, and employer and contribution information for all contributors who have provided at least \$5,000 to a lobbying organization.⁹ These mandated disclosures implicate core First Amendment rights to petition the government and to advocate for or against potential government action.

JCOPE’s proposed regulations raise a number of concerns. First, government regulation of lobbying and the imposition of disclosure obligations are consistent with the First Amendment only if they are limited to “direct communication” with elected officials to influence legislation. Second, the JCOPE regulations require the disclosure of information on contributors to organizations that engage in lobbying, even if the contributed funds are never utilized for such a purpose. This provision is overly broad, and as a consequence, infringes upon First Amendment rights. Third, the mandated disclosure of personal information about contributors will undoubtedly have a “chilling effect” on the exercise of protected speech and petition activities. Finally, the First Amendment requires that the proposed regulations provide for exemptions for controversial organizations upon a showing of a “reasonable” likelihood of harm from the disclosures. Each of these will be addressed in turn.

II. In seeking to regulate all attempts to “influence the passage or defeat of any legislation,” the Lobby Act and the Source of Funding regulations extend beyond the scope of activities the government is constitutionally permitted to regulate.

As currently written, the Lobby Act and the Source of Funding regulations attempt to regulate any and all attempts to “influence the passage or defeat of any legislation,” even if such efforts do not involve direct communication with lawmakers or a choreographed grassroots campaign. This extends well beyond established constitutional limits. Accordingly, the regulations should be amended to include the constitutionally required, narrow definition of lobbying activities subject to government regulation.

⁶ *Buckley*, 424 U.S. at 64.

⁷ *See, id.*

⁸ N.Y. Leg. Law §§ 1-h(4), 1-j(4).

⁹ *Source of Funding Regulations*, 13 N.Y.C.R.R. 938, *et seq.*

In light of the well-established First Amendment rights to express opinions on government action and to petition the government (both of which may involve lobbying activities), the Supreme Court has noted the necessity of construing disclosure requirements for lobbying activities “narrowly to avoid constitutional doubts.”¹⁰ The Court, in *U.S. v. Harriss*, accordingly concluded that the government can only regulate “lobbying in its commonly accepted sense – [] direct communication with members of [government] on pending or proposed [] legislation.”¹¹

The New York Lobby Act is, on its face, considerably overbroad. It is quite similar in this respect to the statute that the Supreme Court in *Harriss* found to be unconstitutional.¹² The Lobby 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.¹³ By its terms, New York’s law does not confine itself to “direct communications” with legislators, as is 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.

In order to save the constitutional validity of the statute, the State Lobbying Commission has previously stated in an advisory opinion that it will not apply the New York Statute “in any context outside the definition of lobbying contained in the *Harriss* case.”¹⁴ The State Lobby Act’s constitutional validity thus rests upon the grounds that it seeks to regulate *only* direct communications with lawmakers, and so long as there is “no indication that this New York legislation requires disclosure of indirect lobbying activities.”¹⁵

The new JCOPE regulations contain no definition of “lobbying” activities which are subject to regulation. To the extent that the regulations rely on the underlying definition of “lobbying” provided in the Lobby Act, they are relying on an unconstitutionally over broad definition. The regulations should therefore be amended to include a definition of “lobbying” that comports with the constitutionally permissible scope of government regulation, reaching only organizational efforts to influence legislation which include direct communications with lawmakers or a choreographed grassroots campaign that makes a direct appeal to public officials.

¹⁰ *U.S. v. Harriss*, 347 U.S. 612, 613 (1954).

¹¹ *Harriss*, 347 U.S. at 620.

¹² The Supreme Court in *U.S. v. Harriss*, 347 U.S. at 614, concluded that the federal lobby statute was unconstitutionally overbroad. That statute sought to require disclosures from lobbyists, defined as “any person...[who] receives money or any other thing of value to be used principally to aid (a) [t]he passage or defeat of any legislation by the Congress of the United States.”

¹³ N.Y. Leg. Law 1-c(c)(i)-(x).

¹⁴ *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).

¹⁵ *Id.*

III. The proposed Source of Funding Regulations are overly broad, requiring the disclosure of information about contributions neither designated for, nor utilized to, support lobbying activities.

The Supreme Court has held that “contributions and persons having only an incidental purpose of influencing legislation” are excluded from the scope of acceptable government regulation of lobbying activities.¹⁶ Notwithstanding this, JCOPE’s Source of Funding Regulations require organizations that meet the threshold requirements for disclosure to report *both* contributions “specifically designated for lobbying in New York” *as well as* contributions “not specifically designated for lobbying in New York” (the latter of which are reported as a percentage of the actual contribution).¹⁷ The regulations therefore require that organizations disclose information about contributions that are merely *available* for lobbying activities, regardless of whether they are ever utilized for such a purpose.

This regulatory scheme extends beyond lobbying activities, requiring the disclosure of personal information from contributors whose funds will never be used to fund lobbying activities. The compelled disclosure of contributions which may only incidentally support an organization’s attempts to influence legislation is unconstitutionally over broad. The NYCLU therefore objects to the disclosure scheme to the extent that it requires the public sharing of personal donor information related to contributions that are not utilized by organizations to influence legislation.

IV. In seeking the disclosure of personal information, JCOPE’s regulations will undoubtedly have a “chilling effect” on the willingness of individuals to engage in constitutionally protected expression.

In assessing compelled government disclosure requirements, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”¹⁸ Regulations which encroach upon constitutionally protected rights “must be justified by more than a showing of a mere rational or legitimate interest.”¹⁹

The mandated disclosure of contributors’ names, addresses, employers, and contribution information is likely to result in people either contributing less to advance issues that they believe in (so they do not fall within the scope of the compelled disclosure) or altogether withholding their support from organizations that are required to report on the identity of their donors. As a result, the Single Source Disclosure requirements may inhibit the full and free exercise of the First Amendment right to petition the government, and to associate with likeminded individuals.

¹⁶ *Harriss*, 347 U.S. at 622 (internal quotation mark omitted).

¹⁷ 13 N.Y.C.R.R. 938.2 (“Amount of Contribution(s)”).

¹⁸ *Doe v. Reed*, 130 S.Ct. 2811, 2818 (2010).

¹⁹ *Commission on Independent Colleges & Universities*, 534 F. Supp. at 494.

Disclosure requirements have been upheld only to the extent that they advance the important government interest in “stemming the reality or appearance of corruption in the electoral process.”²⁰ Government regulation of campaign finance speech rests upon an interest in preventing any corruption which may be created by the relationship between a contributor and an elected official.

The concerns about corruption in the lobbying context are quite different. While there may be an interest in knowing which organizations are expending resources to influence legislation, there is a more attenuated interest in the personal information of donors who contribute to organizations which then use those funds to hire a lobbyist to take action on a variety of proposed issues. As a matter of policy, it is unclear why the government’s interest in maintaining transparency would not be adequately served in this context by limiting the disclosure requirement to expenditures related to an organization’s lobbying activities.

V. The standards for granting controversial organizations an exemption from the disclosure requirements deviate impermissibly from the constitutionally mandated standard.

A government requirement that an organization disclose the identity and personal information of financial supporters “can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”²¹ Therefore any government-mandated disclosures of such contributors must provide exemptions for individuals or organizations for whom disclosure could result in harassment or reprisals.²² The Supreme Court has found that the constitution requires that organizations be granted exemptions from compelled disclosures if they can demonstrate “a *reasonable probability*” that the forced disclosure of their donors or members will “subject them to threats, harassment, or reprisals from either Government officials or private parties.”²³ Organizations must be afforded “sufficient flexibility” in the evidence that they are permitted to offer in demonstrating a likelihood of injury from the disclosures.²⁴

JCOPE’s regulations provide that the Commission “may” grant an exemption from the Single Source disclosure requirements for 501(c)(4) organizations, provided that the organization “shows that its primary activities involve areas of public concern that create a *substantial likelihood* that disclosure of its Single Source(s) will cause harm, threats, harassment or reprisals to the Single Source(s) or individuals or property affiliated with the Single Source(s).”²⁵ This standard deviates from the constitutionally required standard that exemptions are provided whenever there is a “*reasonable probability*” of harm to contributors. Further, the “substantial

²⁰ *Citizens United*, 130 S. Ct. at 903.

²¹ *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

²² *See, e.g., Brown et al. v. Socialist Workers’ ’74 Campaign Committee*, 459 U.S. 87 (1982).

²³ *Socialist Workers*, 459 U.S. at 93 (citing *Buckley*, 424 U.S. at 74) (emphasis added); *see also, Citizens United v. F.E.C.*, 130 S. Ct. 876, 914 (2010).

²⁴ *Socialist Workers*, 459 U.S. at 93.

²⁵ 13 N.Y.C.R.R. 938.4(b) (emphasis added).

likelihood” standard appears to require a higher evidentiary showing of the likelihood of actual harm. Accordingly, the standard for exemptions should be amended to bring it closer in line with the standard required by the constitution – allowing for the granting of exemptions whenever there is a “reasonable” likelihood that the disclosure will lead to harassment or reprisal.

In order to protect the associational privacy of contributors to organizations that work on controversial issues, the NYCLU urges JCOPE to grant such exemptions upon the showing of a reasonable likelihood that the disclosure will lead to harm. As the Legislature noted in enacting the Lobby Act, “organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption.”²⁶ Granting exemptions to organizations engaged in such issues will ensure that their financial supporters do not become the targets of harassment, and worse, for their support of controversial work. This will also ensure that organizations are not undermined in their ability to engage in such advocacy.

VI. Conclusion

JCOPE’s Source of Funding Regulations implicate speech and activities at the core of the First Amendment’s protections. The NYCLU encourages JCOPE to narrow its reporting requirements so that they require only the reporting of information that actually advances the State’s interest in promoting transparency, without compromising First Amendment rights. The regulations should define “lobbying” activities consistent with the definition upheld by the Supreme Court: attempts to influence legislation which include direct contact with legislators or a choreographed grassroots campaign. Further, the disclosure requirements should only require reporting on contributions that are actually utilized by an organization to support lobbying activities. As a matter of policy, the NYCLU questions the mandated disclosure of personal information about contributors, given the foreseeable chilling of constitutionally protected activities, and the absence of any clear connection or relationship between such contributions and the effort to contact, or influence, elected officials. Finally, the standard for granting controversial organizations exemptions from the disclosure requirements should be amended so as to be consistent with the constitutionally necessary standard for such exemptions.

²⁶ 2011 NYS Legislative Bill and Veto Jackets, S:5679, L 2011, ch. 399, at 10 (2011).

BRENNAN
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FOR JUSTICE

Brennan Center for Justice
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February 8, 2013

Joint Commission on Public Ethics
Attn: Shari Calnero, Associate Counsel
540 Broadway
Albany, New York 12207

Re: Revised Regulation Part 938 – Source of Funding Regulations

Ladies and Gentlemen:

On behalf of the Brennan Center for Justice, I write to reaffirm our support for the lobbyist source of funding regulations adopted by the New York State Joint Commission on Public Ethics to implement Legislative Law Section 1-h(c)(4). The regulations implemented the nation's first system of disclosure of funding sources for specified lobbying entities spending in excess of \$50,000 per year on lobbying expenditures. I also write to express support for the emergency rulemaking undertaken last month to refine the contribution formula.

The new regulations address concerns raised in the wake of influential public campaigns by newly-formed lobbying entities unrecognizable to the public meant to influence the legislative and lawmaking process. The goal of the new regulations, implemented under the provisions of the Public Integrity Act of 2011, is to end the practice of this "black box" lobbying in our state in order to give the public, the media, and our policymakers a plain and clear understanding of who is backing such efforts. New York State has led the way forward for the rest of the nation on transparency and accountability in lobbying activities.

As of this writing, 54 statements of sources of funding have been filed and made available online on the website of the Joint Commission on Public Integrity. While we have not had sufficient time to review each one, our impression is that the disclosure statements are serving their intended purpose. It is unfortunate that the Source of Funding disclosure form is not part of JCOPE's online filing system, which would make the burden of filing marginally easier for lobbying clients and would allow the public better access to the information contained in the reports, but we understand that it is difficult to implement both new regulations and an online filing system in the short time frame mandated by the Act. We look forward to reviewing the reports in more detail in the coming weeks and discussing ways to make both filing and access simpler for everyone.

It takes time for everyone to adjust to new disclosure regimes and we anticipate having more to say once we have an entire year of source funding disclosures to review. We note that the reporting period for the disclosure reports due on January 15 did not include the regular legislative session. And, going forward, the Commission may want to ask whether additional disclosures should be mandated when, for example, a source of funds is reported with the same street address as the client filer (we noticed one such instance in our preliminary review of the reports) or all sources consist of unrecognizable entities such as LLC's.

We believe the refinement to the definition of "Amount of Contribution" is an acceptable clarification of the source of funding disclosure requirement. The purpose of the requirement is to provide meaningful information about lobbying expenditures within New York State and the formula is fair and reasonable in this regard.

The Brennan Center thanks the Commission and the staff for their hard work on these important regulations.

Sincerely,

A handwritten signature in cursive script that reads "Kelly Williams".

Kelly Williams
Corporate General Counsel
Brennan Center for Justice at New York University School of Law



New York Farm Bureau • 159 Wolf Road P.O. Box 5330 • Albany, New York 12205 • (518) 436-8495 Fax: (518) 431-5656

February 7, 2013

NYS Joint Commission on Public Ethics
540 Broadway
Albany NY 12207

RE: Comments on New Disclosures Required by Source Funding Disclosure Requirements
I.D. No. JPE-37-12-00006-ERP

My name is Julie Suarez and I serve as Director of Public Policy for New York Farm Bureau ("NYFB"), a not-for-profit membership organization serving the interests of New York's farmers. On behalf of NYFB, I would like to thank you for providing NYFB with the opportunity to comment on the revised proposed Source of Funding regulations.

NYFB is registered as a lobbyist pursuant to the Lobbying Act (the "Act") and is anticipated to meet the threshold described in §1-h (c) (4) of the Act, triggering source funding disclosures. NYFB also reports as a lobbying "client" under the Lobbying Act, and therefore would also need to report qualifying sources of funding under the Lobbying Act, §1-j (c) (4). NYFB's public policy work and lobbying activities are solely intended to further NYFB's farmer-member-developed policies. NYFB does not represent any other organizations. NYFB the "lobbyist" is identical to NYFB the "client," because NYFB employs its lobbyists and does not utilize outside lobbyists.

As a membership organization, NYFB has a variety of membership dues categories, sponsorships, and business relationships that bring in revenue to NYFB. This revenue is applied to NYFB's menu of programs, including, but not limited to, promotion and education, legal advocacy, leadership development and legislative affairs. No income that NYFB receives is directly allocated to "lobbying" and is included in NYFB's "general fund."

The proposed regulations define "contribution" as "any payment to, or for the benefit of, the Client Filer and which is intended to fund, in whole or in part, the Client Filer's activities or operations." This definition is substantially broader than the statute approved by the Legislature which reads in pertinent part Client Filer "...shall report to

the commission the names of each source of funding over five thousand dollars from a single source that were used to fund the lobbying activities reported and the amounts received from each identified source of funding.” The proposed definition includes all activities and operations, not only those related to legislative affairs.

NYFB does not receive specific contributions for lobbying purposes. The definition of contribution also relates to payments “intended to fund” the Client Filer’s “activities and operations.” Our members and business partners do not state the intent behind their payments, and the requirement that a Client Filer presume that intent is unreasonable.

While the revised proposed regulations changes the reportable amount of the “payment” “intended to fund” lobbying activity to the percentage of the Client Filer’s overall expenditures, which is attributable to state lobbying activities, the same infirmities of the original proposal remain. With regard to the entities with which NYFB does business, NYFB does not know what the intent behind a payment related to such business relationship is. Requiring a Client Filer, like NYFB, to assume or presume the intent behind a payment from a business partner or even a member goes far beyond the plain language of the statute. Since NYFB cannot know the intent in all circumstances, it is possible that a portion of any funding NYFB receives would require disclosure because a percentage of its budget may be used for lobbying purposes, and NYFB does not designate its income upon receipt for any specific purpose. If NYFB receives a contribution (i.e. donation) to pursue its lobbying agenda, clearly this would need to be disclosed under the statute, unlike business or dues-related payments where the intent is unknown.

NYFB is concerned that this extremely broad reporting requirement will muddy the waters with non-relevant information, rather than create more transparency. In disclosing all sorts of payments, the payments that are truly related to lobbying will be obscured.

Organizations, like NYFB, are placed at a competitive disadvantage by these broad guidelines because they are required to disclose at least a portion of all payments they receive over \$5,000.00, regardless of any connection with their lobbying activities. All non-profits compete for grants funding, sponsorship monies, and royalties. The requirement is that NYFB disclose the companies that we do business with if the business relationship results in payments of \$5,000.00 annually. For NYFB, these financial relationships are important to pursuing the menu of programs and services described above. In addition, some of the arrangements have been in place under multi-year agreements, which prohibit disclosure of the terms of the agreements. While these arrangements have nothing to do with lobbying, the funding they provide exceeds \$5,000.00, and we have no way to know the intent of the other parties in doing business with NYFB. Did these businesses intend to support NYFB’s mission by

contracting with it, or did it do business with NYFB entirely of its own business reasons? The onus is on NYFB to report or not report based on its speculation on the intent of our business partners.

The above scenario also highlights another factor of concern to NYFB. Since the proposed definition grossly exceeds the actual statutory language, Client Filers were unable to put members, sponsors or other business partners on notice that their payments would require disclosure under the revisions to the Lobbying Act. By requiring the reporting of transactions that occurred prior to the adoption of the language, the proposed regulations potentially damage organizational relationships by changing the playing field mid-game, as well as creating the erroneous impression that such relationships are premised on, or related to, lobbying activities.

Another point that bears noting is the fact that the "expenditure threshold" test laid out in the regulations only counts lobbying expenditures and compensation. In contrast, a portion of all payments exceeding the \$5,000.00 threshold that are received must be disclosed. This mandate makes the regulation more intrusive and burdensome than it was intended to be.

NYFB is writing to encourage the Commission to further revise the proposed regulations to clarify that only funding sources, which specifically designate the funds given to the lobbying organization to be used for "lobbying," must be disclosed. Otherwise, organizations such as NYFB would need to report all of its sources of funding over \$5,000.00, simply because the funds enter the NYFB bank account. As a result, groups like NYFB would be burdened with additional disclosures, and ultimately would not provide any other meaningful information to the public because there is no lobbying intent behind these funding sources.

Again, on behalf of New York Farm Bureau, thank you for the opportunity to comment on the revised regulations relating to the Source Fund Disclosure provisions of the Act. If I can be of any assistance, please do not hesitate to contact me at (518) 431-5607.

Sincerely,

A handwritten signature in cursive script that reads "Julie C. Suarez". The signature is written in dark ink and is positioned above the typed name and title.

Julie Suarez
Director of Public Policy

Dear JCOPE:

I missed Friday's deadline for formal comments on the revised Source of Funding regulations, but wanted to throw in my two cents worth anyway.

In my view, the "Amount of Contribution(s)" definition in Section 938.2 is an arbitrary leap of logic.

Why is the "reasonable person test" that is used in enforcing the Reportable Business Relationship rule not applied here as well? What reasonable person would conclude that when a member of a client association pays the association \$5,000 or more in the form of a trade show booth rental, event sponsorship, and/or membership directory advertisement, he/she does so with the intent that some portion of it be devoted to lobbying expenses incurred by the association?

When we send out membership renewal notices every year, in accordance with federal law the invoice clearly states the percentage of the dues payment that is non-deductible as a business expense because the association anticipates using that portion for lobbying. Our CPA calculates that percentage based on our total anticipated lobbying expenses and our total anticipated dues income. Trade show booths, event sponsorships and registrations, and advertising are totally separate from dues. We don't need any such revenue for lobbying, because our lobbying expenses are covered entirely by dues.

Given these circumstances, Part 938 is requiring my client association to report something that is utterly untrue -- that a percentage of our trade show, sponsorship, advertising, and event registration income goes to lobbying.

Thank you.

--

Jim Calvin, President
New York Association of Convenience Stores
130 Washington Avenue, 3rd Floor
Albany NY 12210
office 518-432-1400
cell 518-441-4918
jim@nyacs.org

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Manuta, Louis (JCOPE)

From: Jim Calvin [jim@nyacs.org]
Sent: Monday, February 11, 2013 4:46 PM
To: Joint Commission on Public Ethics (JCOPE)
Subject: Source of Funding regs

Dear JCOPE:

I missed Friday's deadline for formal comments on the revised Source of Funding regulations, but wanted to throw in my two cents worth anyway.

In my view, the "Amount of Contribution(s)" definition in Section 938.2 is an arbitrary leap of logic.

Why is the "reasonable person test" that is used in enforcing the Reportable Business Relationship rule not applied here as well? What reasonable person would conclude that when a member of a client association pays the association \$5,000 or more in the form of a trade show booth rental, event sponsorship, and/or membership directory advertisement, he/she does so with the intent that some portion of it be devoted to lobbying expenses incurred by the association?

When we send out membership renewal notices every year, in accordance with federal law the invoice clearly states the percentage of the dues payment that is non-deductible as a business expense because the association anticipates using that portion for lobbying. Our CPA calculates that percentage based on our total anticipated lobbying expenses and our total anticipated dues income. Trade show booths, event sponsorships and registrations, and advertising are totally separate from dues. We don't need any such revenue for lobbying, because our lobbying expenses are covered entirely by dues.

Given these circumstances, Part 938 is requiring my client association to report something that is utterly untrue -- that a percentage of our trade show, sponsorship, advertising, and event registration income goes to lobbying.

Thank you.

--

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The
Business
Council

HEATHER BRICCETTI
President

February 25, 2013

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Ms. Ellen Biben
Executive Director
Joint Commission on Public Ethics
540 Broadway
Albany, NY 12207

Dear Ellen:

I am writing today to share my concern and frustration with two JCOPE decisions regarding Lobbying Act compliance. I am concerned that JCOPE's regulatory decisions are inconsistent with the letter and intent of statutory provisions, and that decisions (i) result in significant additional administrative burdens and costs, (ii) have questionable public benefit, and (iii) create substantial compliance burdens and uncertainty for The Business Council and other members of the regulated community.

I look forward to the opportunity to discuss both the legal and practical component of these issues with you and your staff at your convenience. I believe that there are workable alternatives that meet the legislature's compliance and disclosure objectives while providing the regulated community with more straightforward, manageable compliance obligations.

Reportable business relationship ("RBR") – The statute is clear in that any "client of a lobbyist" is required to disclose business relationships with public officials valued in excess of \$1,000 per year. The Lobbying Act clearly defines "client" in § 1-c (b) as "every person or organization who retains, employs or designates any person or organization to carry on lobbying activities on behalf of such client." The Lobbying Act further defines "organization" as "any corporation, company, foundation, association, college . . . , labor organization, firm, partnership, society, joint stock company, state agency or public corporation."

There is no dispute that The Business Council is a client of a lobbyist. Thus, it is clear that as a result of the RBR statute, the Business Council must disclose reportable business relationships between the Council and certain public officials. This is a manageable obligation, even with the expansive set of public officials and employees to which this provision applies. Unfortunately, however, JCOPE's RBR Guidelines make this standard unmanageable. In these guidelines, JCOPE arbitrarily redefines the term "client" in instances where the client is an "organization," to include the organization's "directors" and "executive management" (an undefined term, the precise meaning of which is unclear). Since the Legislative Law defines the term "organization" to mean associations as well as corporations, under JCOPE's unsupported redefinition of "client," trade

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associations as well as business corporations appear obligated to query their board of directors and some unclear subset of their internal managers as to their personal business relationships with New York public officials.

There is no other Lobbying Act-related statute, rule, or regulation that uses this modified definition of "client," and there is no other aspect of the Lobbying Act that expands the definition of "client" to include to an organizations' directors and managers.

JCOPE's approach results in two major concerns. First and foremost, there is no statutory basis or authority for JCOPE to disregard the clear statutory definition of "client" and apply a new, unsupported meaning for this specific compliance purpose as part of an informally issued guidance document. Second, it imposes an obligation on the organization to intrude into non-business-related contracts involving their directors and managers. Since it is unclear what level of inquiry would satisfy the "knows or has reason to know" threshold, organizations are put in the strange and awkward position of having to ask their boards and managers about such relationships. By imposing this requirement on members of boards of directors, many of whom have no ties to New York State, JCOPE adds a new and challenging compliance risk upon these board members. There is simply no justification for this intrusive and unsupportable expansion of the statute's plain language and meaning.

The solution to these problems is simple: JCOPE should conform its RBR Guidelines to the authorizing statute and limit this reporting obligation to the "client," as such term is defined in the Legislative Law.

Source of funds – The Lobbying Act requires disclosure of any "source of funding over five thousand dollars from a single source that were used to fund the lobbying activities reported [to JCOPE] and the amounts received from each identified source of funding." [Emphasis added.]

Generally speaking, trade associations receive little or no payments specifically for lobbying; their lobbying activities are funding from a portion of dues payments and other revenue sources. However, trade associations do report expenditures of lobbying activities to JCOPE, in addition to reporting the share of dues payments used for lobbying expenditures to the IRS.

Again, JCOPE has decided to disregard these well-established practices, as well as existing law, and adopt a new compliance standard through emergency regulations. By its express terms, the recently enacted provision of the Lobbying Act only requires disclosure of funding pertaining to State lobbying activities. "Lobbying" and "lobbying activity" are defined terms under the legislative law that require that the lobbyist "attempt to influence" some enumerated governmental action. Yet, the regulation requires trade association filers to disclose some portion of payments made to the association, regardless of whether the payment was for lobbying or other services.

We have two specific concerns regarding JCOPE's emergency rule and proposed final rule on "source of funds." First, it has the incongruous effect of requiring

many trade associations – including The Business Council - to report “source of lobbying funds,” even if the source provided significantly less than the \$5,000 threshold referenced in the statute. Second, the proposed approach imposes a significant new administrative burden because of the recordkeeping and reporting requirements, which go well beyond our typical accounting and bookkeeping practices, necessary for compliance with this new requirement.

The Business Council has on several occasions provided written recommendations to JCOPE on how to deal with the “source of fund” disclosure mandate with regard to associations. Specifically, we urged JCOPE to use existing lobby expense data as reported to JCOPE to define the “source of funds” required to be disclosure, i.e., The Business Council’s ratio of reportable lobby expenses to total expenses would be applied to total payments from a single source. As our ratio of lobbying expenditures to total expenditures is about 25 percent, under this approach we would disclose the source, amount and date of payments exceeding \$20,000 in the aggregate. JCOPE’s emergency and proposed final rule partially accepts and partially rejects The Business Council’s proposal. Essentially, the emergency and proposed rules require associations to identify every source of \$5,000 or more, regardless of how much that source has contributed to the lobbying effort, and report an amount that is the result of their total payments multiplied by its “lobby expense ratio.”

No doubt, this standard is a significant improvement over JCOPE’s initial draft regulation, which would have required the disclosure of the source, amount and date of all contributions over \$5,000 (in aggregate), regardless of the purpose of the contribution. Even with this improvement, however, the regulation is inconsistent with a plain reading of the statute, which requires disclosure of sources of lobbying funds of \$5,000 or more. Instead, the promulgated rule requires that The Business Council report information regarding sources that make as little as \$1,250 in payments that are attributable towards lobbying expenses. This result is inconsistent with the clear statutory intent of the “source of funds” disclosure mandate and results in disclosure of amounts that may actually exceed the total amount expended by the Business Council for lobbying activity.

Moreover, the new disclosure requirement increases our direct reporting obligations more than three-fold under the emergency rule, compared to our proposed approach. Moreover, it requires a substantial increase in internal financial reviews, mostly done manually, to ascertain whether any of our 2,500 member businesses approach this \$5,000 total aggregate payment threshold over a rolling twelve-month period. Because of the way the rule works, this process cannot easily be automated. Thus, the new requirement literally requires dozens of man-hours to complete accurately.

The “source of funding” statute is widely seen as a response to certain advocacy organizations with little or no public disclosure as to their members or funding sources. In contrast, many trade associations, including The Business Council, publicly disclose their members and their directors, as well as provide extensive lobby expense and other lobbying activity disclosures to JCOPE. It is unclear to us how this expansive application of the “source of funding” mandate to long-

established trade associations provides any significant new information to the public. In summary, it remains unclear to us why a reportable lobby expense figure already accepted by both JCOPE and the IRS, is not appropriate in this setting.

Finally, we are compelled to note that our compliance efforts are further aggravated by a JCOPE on-line reporting system that often simply does not work. If the regulated community is required to make investments to meet these new compliance standards, we respectfully note that the Commission too must make investments, and urge that JCOPE start with upgrading its technology and improving its website.

I appreciate your willingness to consider our concerns, and to consider possible further amendments to JCOPE's approach on these two issues. I look forward to meeting soon.

Sincerely,

A handwritten signature in cursive script, appearing to read "William Brueggemann".

Copy to Robert Cohen, Commission Members